

(29,104)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 554.

SOUTHERN POWER COMPANY, PETITIONER,

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF
GREENSBORO, AND CITY OF HIGH POINT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

	Original.	Print.
Caption in U. S. district court for western district of North Carolina	1	1
Transcript from superior court of Guilford County.....	1	1
Summons	1	1
Sheriff's return.....	2	2
Prosecution bond for costs.....	2	2
Complaint	3	2
Exhibit "A"—Letter from Southern Power Co. to C. B. Hole, dated January 8, 1920..	20	15
"B"—Letter from Southern Power Co. to C. B. Hole, dated January 8, 1920.	22	16
"C"—Letter from N. C. Public Service Co. to Southern Power Co., dated January 27, 1920.....	23	17
Notice of defendant for removal to U. S. court.....	26	19
Petition for removal.....	27	19
Bond for removal.....	32	23
Order refusing to grant petition for removal.....	34	24
Clerk's certificate.....	35	24
Notice of removal, filed September 15, 1920.....	36	25

	Original.	Print.
Order allowing defendant additional time to answer.....	37	26
Answer of defendant.....	38	26
First further answer.....	58	41
Second further answer.....	59	42
Third further answer.....	61	43
Fourth further answer.....	64	45
Fifth further answer.....	67	47
Sixth further answer.....	69	48
Seventh further answer.....	72	51
Reply of plaintiffs.....	81	57
Motion of plaintiffs to remand.....	86	60
Transcript from superior court of Gullford County.....	88	61
Affidavit of R. J. Hole.....	88	61
Undertaking on restraining order.....	90	63
Restraining order.....	91	64
Notice of defendant for removal.....	93	65
Petition to remove cause to U. S. court.....	95	66
Bond for removal.....	102	71
Judgment.....	104	72
Clerk's certificate.....	109	76
Supplemental petition of defendant.....	110	77
Order to show cause.....	114	79
Reply of plaintiffs to supplemental petition.....	115	80
Judgment of superior court of Gullford County.....	123	86
Order continuing restraining order and setting case for hearing.....	129	86
Petition of Southern Power Co.....	131	87
Exhibit 1—List of contracts.....	133	88
Order requiring plaintiffs to produce certain contracts, papers, etc.....	135	89
Motion of plaintiffs for final decree.....	136	89
Statement of evidence.....	137	90
Testimony of W. S. Lee.....	137	90
Exhibit C—Letter, Southern Power Co. to C. H. Andrews, December 19, 1912.....	185	126
Exhibit D—Letter, Southern Power Co. to C. H. Andrews, April 10, 1917.....	185	126
Offers in evidence.....	194	132
Testimony of R. L. Pickett.....	197	134
V. M. Morris.....	198	135
G. C. Howard.....	199	135
J. W. Matthews.....	203	139
Offers in evidence.....	205	140
Exhibit—Paragraphs 4 and 5 of replication of plaintiffs in Salisbury case.....	206	141
Offers in evidence.....	212	145
Exhibit—Allegation 15 of complaint in Salisbury case.	213	146
Exhibit—Answer to same in Salisbury case.....	214	147
Exhibit—Statement by Mr. Robinson in Salisbury case.	215	148

INDEX.

iii

Original. Print.

Defendant's Exhibit No. 1—Agreement between Southern Power Co. and High Point Electric Co., November 21, 1908.....	216	148
Defendant's Exhibit No. 2—Letter, High Point Electric Co. to Southern Power Company, February 11, 1908.....	224	154
Defendant's Exhibit No. 3—Letter, High Point Electric Company to Southern Power Company, August 20, 1908	225	154
Defendant's Exhibit No. 4—Letter, High Point Electric Company to Southern Power Company, August 24, 1908	226	155
Defendant's Exhibit No. 5—Letter, High Point Electric Co. to Southern Power Co., August 29, 1908.....	227	156
Defendant's Exhibit No. 6—Letter, High Point Electric Co. to Southern Power Co., September 4, 1908.....	228	156
Defendant's Exhibit No. 7—Letter, High Point Electric Company to W. S. Lee, October 6, 1908.....	229	157
Defendant's Exhibit No. 8—Letter from High Point Electric Co. to Southern Power Co., dated October 10, 1908.....	231	159
Defendant's Exhibit No. 9—Letter from High Point Electric Co. to Southern Power Co., dated October 20, 1908	233	160
Defendant's Exhibit No. 10—Agreement between Southern Power Co. and Greensboro Electric Co., dated December 23, 1908.....	235	161
Defendant's Exhibit No. 11—Ordinance and resolution granting permission to Southern Power Co. to construct and maintain its lines, etc.....	243	167
Defendant's Exhibit No. 12—Schedule of rates charged by N. C. Public Service Co., effective prior to April 1, 1919.....	246	169
Defendant's Exhibit No. 13—Schedule of rates charged by N. C. Public Service Co. subsequent to May 1, 1919	249	170
Defendant's Exhibit No. 14—Letter from E. C. Deal to W. S. Lee, dated July 28, 1916.....	251	172
Defendant's Exhibit No. 15—Opinion of supreme court of North Carolina, dated December 20, 1919, as published in Greensboro Daily News, Thursday, May 6, 1920	252	173
Defendant's Exhibit No. 16—Contract between N. C. Public Service Co. and City of High Point, dated October 19, 1909.....	279	192
Defendant's Exhibit No. 17—Contract between N. C. Public Service Co. and City of High Point, dated June 15, 1914.....	285	196
Defendant's Exhibit No. 18—Agreement between N. C. Public Service Co. and City of High Point, dated August 12, 1914.....	290	200

	Original.	Print.
Defendant's Exhibit No. 19—Contract between N. C. Public Service Co. and City of High Point, dated March 2, 1920.....	294	202
Defendant's Exhibit No. 20—Bill, dated June 10, 1921.....	300	207
Defendant's Exhibit No. 21—Bill, dated June 10, 1921.....	301	208
Defendant's Exhibit No. 22—Letter from N. C. Public Service Co. to High Point Hosiery Mills, dated February 3, 1915.....	301	109
Contract between N. C. Public Service Co. and High Point Hosiery Mills and Piedmont Hosiery Mills, dated February 1, 1915.....	302	209
Defendant's Exhibit No. 23—Contract between N. C. Public Service Co. and Stehl Silk Corp., dated October 27, 1916.....	308	213
Defendant's Exhibit No. 24—Contract between N. C. Public Service Co. and Durham Hosiery Mills No. 3, Inc., dated April 1, 1917.....	313	217
Defendant's Exhibit No. 25—Contract between N. C. Public Service Co. and Armour Fertilizer Works, dated December 1, 1917.....	319	221
Defendant's Exhibit No. 26—Contract between N. C. Public Service Co. and Swift & Co., dated July 30, 1917	325	225
Defendant's Exhibit No. 27—Ordinance granting permission to John Karr and W. D. Barr right, &c., to operate and maintain a street railway in City of Greensboro.....	330	228
Defendant's Exhibit No. 28—Petition of Southern Power Co. to mayor and board of commissioners of City of Greensboro.....	338	234
Defendant's Exhibit No. 29—Ordinance granting franchise to Southern Power Co. to sell and distribute electricity, etc., in City of Greensboro.....	344	238
Defendant's Exhibit No. 30—Report of canvassing board on special election held June 26, 1920.....	350	242
Defendant's Exhibit No. 31—Agreement between City of Greensboro and N. C. Public Service Co., dated July 1, 1919.....	352	243
Defendant's Exhibit No. 32—Circular letter issued by North Carolina Public Service Co.....	356	246
Defendant's Exhibit No. 33—Circular letter issued by North Carolina Public Service Co., dated June 16, 1920	358	247
Defendant's Exhibit No. 34—Letter, dated June 16, 1920, signed N. C. Public Service Co., Chas. B. Hole, president	360	249
Defendant's Exhibit No. 35—Letter, signed N. C. Public Service Co., Chas. B. Hole, president.....	362	250
Defendant's Exhibit No. 36—Certificate of incorporation of Southern Power Co.....	364	251

INDEX.

v

Original. Print.

Defendant's Exhibit No. 37—Agreement between Southern Power Co. and Leaksville Light and Power Co...	371	255
Defendant's Exhibit No. 38—Agreement between Southern Power Co. and Norwood Power & Light Co., dated May 1, 1916.....	379	261
Defendant's Exhibit No. 39—Agreement between Southern Power Co. and Hillsboro Power & Lighting Co., dated April 12, 1916.....	387	266
Defendant's Exhibit No. 40—Agreement between Southern Power Co. and Hillsboro Power & Light Co., dated May 8, 1917.....	396	272
Defendant's Exhibit No. 41—Agreement between Southern Power Co. and Norwood Power and Light Co., dated November 1, 1919.....	397	273
Defendant's Exhibit No. 42—Agreement between Southern Power Co. and Piedmont Ry. & Electric Co., dated December 31, 1915.....	400	275
Defendant's Exhibit No. 43—Agreement between Southern Power Co. and Piedmont Ry. & Electric Co., dated May 31, 1917.....	410	282
Defendant's Exhibit No. 44—Agreement between Southern Power Co. and Piedmont and Northern Ry. Co., dated July 1, 1914.....	412	283
Defendant's Exhibit No. 45—Agreement between Southern Power Co. and Piedmont and Northern Ry. Co., dated January 1, 1916.....	420	288
Defendant's Exhibit No. 46—Agreement between Southern Power Co. and Piedmont and Northern Ry. Co., dated January 1, 1915.....	422	289
Plaintiffs' Exhibit "A"—Letter from W. S. Lee to E. C. Deal, dated June 22, 1909.....	423	290
Plaintiffs' Exhibit "B"—Letter from Southern Power Co. to North Carolina Public Service Co., dated January 8, 1914.....	424	291
Plaintiffs' Exhibit "C"—Letter from Southern Power Co. to N. C. Public Service Co., dated December 19, 1912.....	425	291
Plaintiffs' Exhibit "D"—Letter from Southern Power Co. to N. C. Public Service Co., dated April 10, 1917.	425	292
Plaintiffs' Exhibit "E"—Letter from Southern Power Co. to Greensboro Electric Co., dated April 6, 1909...	426	292
Plaintiffs' Exhibit "F"—Letter from W. S. Lee to E. C. Deal, dated December 3, 1914.....	427	293
Plaintiffs' Exhibit "G"—Letter from Southern Power Co. to Pomona Terra Cotta Co., dated September 20, 1913	428	293
Plaintiffs' Exhibit "H"—Letter from Southern Power Co. to E. C. Deal, dated March 21, 1914.....	428	294

	Original.	Print.
Plaintiffs' Exhibit "I"—Letter from Southern Power Co. to N. C. Public Service Co., dated December 1, 1916.....	429	294
Plaintiffs' Exhibit "J"—Letter from Southern Power Co. to E. C. Deal, dated April 28, 1909.....	430	295
Plaintiffs' Exhibit "K"—Letter from W. S. Lee to Chas. B. Hole, dated December 11, 1917.....	430	295
Plaintiffs' Exhibit "KK"—Prospectus of first-mortgage 5 per cent gold bonds of Southern Power Co. of North and South Carolina.....	432	297
Plaintiffs' Exhibit "L"—Map showing Southern Power Company's transmission system.....	440	301
Plaintiffs' Exhibit "M"—Primary day power contract..	441	301
Plaintiffs' Exhibit "N"—Contract.....	451	308
Plaintiffs' Exhibit "O"—Allegation 15 of the complaint in case of Salisbury & Spencer Ry. Co. and N. C. Public Service Co. <i>vs.</i> Southern Power Co.....	458	313
Opinion	460	314
Decree	464	317
Notice to the defendant of hearing on September 6, 1921, for judge to approve statement and exhibits.....	473	323
Præcipe of plaintiffs.....	474	334
Præcipe of defendant.....	476	325
Memorandum of clerk.....	477	325
Assignment of errors.....	477	325
Order to transmit record.....	483	329
Clerk's certificate.....	483	330
Proceedings in the U. S. circuit court of appeals.....	485	330
Appearance for appellants.....	485	330
Appearance for appellee.....	485	330
Stipulation as to briefs.....	486	330
Argument of cause.....	486	330
Order extending period of six months allowed by district court requiring appellee to furnish electricity to appellants	487	331
Opinion, Woods, J.....	488	331
Dissenting opinion, Waddill, J.....	501	340
Decree	507	344
Petition of appellee for enlargement of time to present petition for rehearing and for stay of mandate.....	508	344
Order enlarging time within which to present petition for rehearing and staying mandate.....	510	345
Petition of appellee for a rehearing.....	511	346
Order denying rehearing.....	541	361
Order staying mandate pending application in Supreme Court for a writ of certiorari.....	542	361
Clerk's certificate.....	543	362
Writ of certiorari and return.....	544	362

1

Transcript of Record.

UNITED STATES OF AMERICA,
Western District of North Carolina:

At a District Court of the United States for the Western District of North Carolina Begun, Opened, and Held in the City of Greensboro on the First Monday in June, A. D. 1921.

Present The Honorable James E. Boyd, Judge of the Western District of North Carolina.

On the 29th day of June of said term, among others were the following proceedings, to-wit:

In Equity.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO,
and CITY OF HIGH POINT, Appellants,

vs.

SOUTHERN POWER COMPANY, Appellee.

Transcript from Superior Court of Guilford County.

Filed September 15th, 1920.

Summons.

GUILFORD COUNTY:

In the Superior Court.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO,
and CITY OF HIGH POINT

vs.

SOUTHERN POWER COMPANY.

The State of North Carolina to the Sheriff of Mecklenburg County,
Greeting:

2 You are hereby commanded to summons Southern Power Co., the defendant above-named, to be and appear before Hon. J. Bis Ray, the Judge of the Superior Court to be held for the County of Guilford at the courthouse in Greensboro, N. C., on Tuesday the 14th day of September, 1920, and answer the complaint which will be presented to Judge J. Bis Ray, a copy of which is herewith served; and let the said defendant take notice that if it fail to answer the said complaint within the time required by law,

Sheriff's Return.

that plaintiffs will apply to the Judge for the relief demanded in the complaint, and the cost to be taxed by the Clerk.

Hereof fail not and of this summons make due return.

Given under my hand and seal of said Court, this 2nd day of September, 1920. (S.) M. W. Gant, Clerk of Superior Court of Guilford County, by Andrew Joyner, Jr., D. C. (Clerk's official seal.)

Sheriff's Return.

Received September 3rd, 1920. Served September 3rd, 1920, by leaving a copy of the within summons and also a copy of the accompanying complaint with E. C. Marshall Asst. Secretary and Treasury- of the Southern Power Company. N. W. Wallace, Sheriff of Mecklenburg County.

Prosecution Bond for Cost.

We acknowledge ourselves bound unto Southern Power Company, the defendant in this Action, in the sum of Two Hundred Dollars, to be void, however, of the plaintiffs, North Carolina Public Service Company, the City of Greensboro and the City of High Point, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals this 2nd day of September, A. D., 1920. North Carolina Public Service Company (Seal), by R. J. Hole, Vice-Pres. (Seal.) R. J. Hole. (Seal.)

Complaint.

[Title omitted.]

The plaintiffs, complaining of the defendant, say:

I.

That the Defendant Southern Power Company, hereinafter called the Power Company, is a public service corporation, chartered and organized under the laws of the State of New Jersey, and doing business in the State of North Carolina, with its principal offices in the City of Charlotte, North Carolina.

II.

That the plaintiff North Carolina Public Service Company, hereinafter called the Public Service Company, is a public service corporation, duly chartered and organized under the laws of the State of North Carolina, with its principal offices in the City of Greensboro, North Carolina; that the plaintiff City of Greensboro is a municipal corporation, duly chartered by the General Assembly of said State under Private Laws, Acts of 1911, chapter —; that the plaintiff City

of High Point is a municipal corporation, duly chartered by the General Assembly of said State under Public Laws, Acts of 1909, chapter —.

III.

That the plaintiff Public Service Company has for many years past and still owns, controls, operates and manages a street car system in, along and over the streets of its coplaintiffs, the City of Greensboro and the City of High Point, under a franchise granted it by each of said cities, that it also owns, controls and operates an electric
4 light and power system in both of said cities under a franchise granted it by them, and under said franchise has for a number of years past, and still furnishes current for the lighting of the streets, public buildings, parks, etc., of each of said cities, and sells and distributes current for light and power to various inhabitants of same.

IV.

That the defendant Power Company is a public service corporation, and as such is granted under the laws of North Carolina the right of eminent domain, and has and is exercising the right and power of eminent domain, and now enjoys the uses and benefits arising therefrom, and is engaged in the wholesale distribution of current for profit.

V.

That the Power Company is engaged, directly and indirectly, in the business of generating hydro-electric power in the State of North Carolina by means of dams built across large streams of water, thus developing enormous horse power which, by suitable machinery, is converted into electric power, and thence conveyed over large wires by heavy voltage in great quantities to what is known as "Receiving Sub-Stations." That at these Stations large transformers are installed, through and by which the current is received and stepped down, that is, reduced from what approximately — 100,00 voltage to 2,300 voltage, and after having thus reduced the voltage and subdivided said power, it is sold and distributed to various and sundry consumers adjacent to and near by these respective sub-stations; that at each of said sub-stations the Power Company maintains an agent in control, that separate meters are kept, by means of which the amount of electric power furnished to each consumer connected therewith is ascertained and determined, and bills for power so furnished are sent out by the Power Company from its Home Office in Charlotte to various parties indebted therefor.

5

VI.

That the Power Company generated from Hydro-electric plants located in North Carolina and owned and controlled by it approximately 62,000 horse power, and generates from steam plants located

in North Carolina and owned and controlled by it approximately 34,000 horse power; that it purchases, controls and distributes for sale over its various lines other power and current approximating 200,000 horse power; that the total volume of electric current now generated, controlled and purchased by defendant Power Company and transmitted over its system, with which its distributing stations at High Point and Greensboro are connected, is more than 300,000 horse power, and the entire amount of current needed to supply the plaintiff's demand in Greensboro and High Point is less than 4,000 horse power; that the total amount of current sold by the defendant Power Company (in North Carolina) to municipalities for light and power, and to the Southern Public Utilities Company, the North Carolina Public Service Company, and all other public utility companies, for resale to municipalities in this State is approximately 17,000 horse power.

VII.

That the Power Company, in order to more successfully conduct its business, has built large and extensive transmission lines, over which it transmits electric current into various sections of Western and Piedmont North Carolina, thus making available to the public its hydro-electric current for both power and light, especially at the following places, to-wit: Charlotte, Gastonia, Concord, Spencer, Statesville, Newton, Winston-Salem, High Point, Greensboro, Burlington, Graham, Hillsboro, Durham, Spray, Reidsville, Hickory, Shelby, Lincolnton, and other North Carolina towns and cities, as well as many cotton mills and other industrial plants along and near its lines connecting with these various cities and localities; that it or near each of said places it has constructed and now maintains and operates a substation, as set forth in paragraph five above.

VIII.

That the defendant Power Company as such public service corporation exercises the right and power of eminent domain, enjoys a monopoly of the markets to and through which its line extends, and is engaged in a business affected with a public use, by reason of which it owes a duty to the public to serve all impartially and without discrimination, and to grant equal rights to all and special privileges to none.

IX.

That the Power Company by reason of the large volume of power which it generates and controls, as aforesaid, and its previous assurances that it could and would furnish power to consumers at less cost than they could produce the same by steam generated from coal, the Public Service Company, as well as a large number of mills, factories and other industrial consumers, were induced by the defendant to discontinue their steam plants and enter into contracts with the Power Company for their necessary electric current and power as a

result of which the defendant now possesses in the territory set out in paragraph seven above, especially at Greensboro and High Point, a complete monopoly of the hydroelectric power market; that there is no other source from which the plaintiff Public Service Company can purchase or obtain power and current to operate its street railway system in the two said cities, and to supply lights for the streets of said cities and the various inhabitants thereof, nor is there any other source from which either of said cities can purchase or obtain power and current to light their streets, or furnish lights for the homes and business places of its many inhabitants.

X.

That the defendant Power Company under and by virtue of its articles of incorporation granted by the State of New Jersey, was and is expressly authorized and empowered to generate, distribute and sell to other corporations electric current and power for distribution and sale for light, heat and power, and for any other uses and purposes for which such current is adapted; that the power Company almost immediately after commencing business in North Carolina and established its home Offices in Charlotte, elected to exercise the authority and power so granted by its charter to engage in the business of selling current and power to other public utility companies, for the purpose of resale to municipalities for light, power, etc., that in August, 1908, it entered into a ten-year contract with the Salisbury and Spencer railway company to furnish current and power to operate its street Railway system, and for resale to the citizens of Salisbury, Spencer and East Spencer, that about 1914 it negotiated similar contracts with the Southern Public Utilities Company, under and by virtue of which this latter Company has been and is re-selling current for domestic, light and power purposes to sixteen different municipalities, in North and South Carolina.

XI.

That in December, 1909, the Defendant Southern Power Company entered into a ten year contract with the plaintiff Public Service Company to furnish through its sub-station near High Point all the necessary current and power which the company might require to operate its street railway system in said City, and to resell to the city of High Point necessary current to light the streets of same, and to re-sell to the inhabitants of said city such current and power as they might desire for lighting their homes and operating the machinery in their various industrial enterprises; that the defendant Power Company in consideration of making said contract, required the Public Service Company to enter into a stipulation, which is incorporated in the contract, as follows: "And said consumer agreed to dismantle its present steam plant, and for the purpose of fixing the amount of power that said consumer should take from said Power Company, said consumer will take from said Power Company all necessary power to be used by it, sold or applied, for the purpose of this paragraph mentioned."

That pursuant to these conditions so imposed, the Public Service Company scrapped its steam plant at High Point, and not a vestage of it remains.

8

XII.

That in January, 1910, the defendant Power Company entered into a ten-year contract with the plaintiff Public Service Company to furnish it all of the power needed for the operation of its street railway system in the City of Greensboro, and also to furnish it all the current needed to light the streets of said city, and to re-sell to the citizens of same to light their respective homes and for power to operate their factories and other industries where such power was required; that the present requirement for current in the city of Greensboro is now about 2,000 horse power, and in High Point about 1,800 horse power.

XIII.

That the aforesaid contract between the Power Company and the Public Service Company to supply the requirements of the Cities of Greensboro and High Point were expiring in High Point December 7th, 1919, and in Greensboro January 10th, 1920; that many months prior to the expiration of these contracts the Power Company proposed to the plaintiff Public Service Company to make new contracts covering the electric power and current requirements at these places, which should extend for an additional period of ten years, and many negotiations were had in an effort to reach an agreement. That defendant Power Company declined, however, to sign any contract covering a period of less than five years, and persisted in demanding an increase in rates, that the new contract offered by the Power Company to the Public Service Company covering its requirements for both Greensboro and High Point carried a stipulation for rates greatly in excess of the former rate charged by it, and greatly in excess of rates charged by the Power Company for like service rendered under the same or substantially similar conditions to other consumers, through the same and other like sub-stations, and was based, as defendant asserted, on the high cost of coal.

XIV.

9 That the president of the defendant Power Company is J. B. Duke, who, as plaintiffs are advised and believe, is the principal owner of the Power Company, and controls the policy and management of same, and that said J. B. Duke is also largely financially interested in various cotton mills in North Carolina, and that each of said mills are furnished power and light through current received from the defendant Company, and that the defendant Power Company has been and is selling current to said mills, under substantially similar conditions as those obtained at Greensboro and High Point, at a much lower rate than that charged, or demanded of the plaintiff, Public Service Company in the written contract which is submitted to this Company for execution.

XV.

That the said J. B. Duke, as plaintiffs are advised and believe, is also the principal owner either directly or indirectly, through his immediate family, of a subsidiary corporation of the Southern Power Company, known as the Southern Public Utilities Company. This last named Company was incorporated in Maine in 1913, and thereafter acquired and now owns the Public Utility franchises in Charlotte, Winston-Salem, Reidsville, and other towns and cities in North and South Carolina; that the Southern Public Utilities Company is now engaged in re-selling hydro-electric power and light to and in these municipalities which is purchased from the defendant Power Company; that the defendant Power Company, acting by and under the influence of the said J. B. Duke, and in his interest, is furnishing power to this Utility Company at each of its stations in Charlotte and Winston-Salem, and in other cities and towns in North and South Carolina under a long term contract, extending to 1944, at a less rate than it demanded and has heretofore charged the plaintiff Public Service Company and proposed to charge in the contract with it submitted for plaintiff to sign for current furnished for like services, under substantially similar conditions, at its sub-station near Greensboro and High Point; that the defendant Power Company's sub-station at Greensboro and High Point are of the kind and character, and for the purposes set out in paragraph five hereof, and from which it distributes and sells hydro-electric power to the plaintiff Public Service Company, and to various other customers in the vicinity adjacent thereto; that plaintiffs are advised and believe, and so allege, that the defendant Power Company is now selling and distributing power from each of said sub-stations to other purchasers of current at a much less rate for like service, under substantially similar conditions, than it has heretofore charged the plaintiff Public Service Company and demanded of it in the renewal contract which it submitted for acceptance.

XVI.

That J. B. Duke, President of the Power Company, is likewise the principal owner, and controls the management of, the Piedmont and Northern Railway Company, which Company was incorporated in South Carolina in 1911, and now owns and operates by electricity a line of railroad extending from Charlotte, North Carolina, to Gastonia, North Carolina; that this railroad Company is of standard gauge, and transports regular freight and passengers, and intercharges with other steam railroads; that the general offices of this railroad are in Charlotte, North Carolina, and the Power Company has for several years past, and still sells this Company current and power with which to operate its said system at a less rate than it demands of plaintiff Public Service Company for like service under substantially similar conditions.

XVII.

That the Plaintiff Public Service Company declined to be thus unjustly discriminated against, and to accede to the demands of the defendant that it execute a long term contract obligating itself to pay an exorbitant and discriminatory rate, which of necessity would be reflected in an increase rate, thus made necessity to be charged its co-defendants Cities of Greensboro and High Point, and to the respective citizens of both cities purchasing current for light or power. Thereupon the defendant Power Company on January 8th, 1920, notified the plaintiff Public Service Company, in writing, that it declined to enter into any contract whatsoever with it to furnish current and power for the needs of the city and citizens of Greensboro and High Point, that it would, however, undertake to furnish same until January 1st, 1921, so that the Public Service Company might have this time in which to otherwise provide its own necessary supply of current and power to furnish its own requirements and the demands of these two Cities, and that thereafter it would cut off and discontinue entirely to furnish any more current to plaintiff Public Service Company at Greensboro and High Point. To this notice the plaintiff on January 27th, 1920, made written reply, copy of the respective communications being hereto attached, marked exhibits "A," "B" and "C," and are asked to be taken as a part of the Complaint.

XVIII.

That on the 26th day of April, 1920, the defendant Southern Power Company filed with the Commissioners of the City of Greensboro an application for a franchise to be allowed to build on the various streets of said city an electric lighting and power system, over and by which it might furnish electric current and power to the City and the citizens of same.

XIX.

That said petition, among other things, states: "That your petitioner is informed and believes that said Public Service Company has not, nor does it intend to take, any steps whatever toward complying with a notice contained in your petitioner's said letter, but expects to reply wholly upon its alleged right to require your petitioner to continue after January 1st, 1921, to furnish it the necessary electricity for distribution among its customers in Greensboro, which your petitioner hereby respectfully notifies your Honorable Board it will refuse to do after the date above mentioned, so that unless this Honorable Board shall grant to your petitioner the franchise hereinafter asked for, the city and the citizens of Greensboro, on and after January 1st, 1921, will be wholly without dependable supply of

12 electricity for their needs and requirements. That while your petitioner denies that said Public Service Company has the right to demand or require that your petitioner shall continue to sell it the necessary electricity for distribution among its customers, yet your petitioner recognizes its obligation to furnish your city and its citizens whatever electricity shall be needed for municipal and domestic consumption in preference to its customers, who only need, or use, the same for industrial purposes, providing your Honorable Board will grant it a franchise to enable it to discharge this public duty or obligation; as it claims, and hereby asserts, the right to render such service directly to the city and citizens of Greensboro, to whom alone it is responsible, and not through the medium of the North Carolina Public Service Company, to whom it owes no duty whatever, it, therefore, hereby applies to this Honorable Board for a franchise to continue, maintain and operate in said city and along and over its streets and other public places therein, the necessary transmission lines, poles, appliances, etc., to enable it to furnish and supply the city and its citizens with the electricity required by them for municipal, domestic and other purposes, hereby assuring your Honorable Board that should said franchise be granted within the time hereinafter stated, it will be read, able and willing to supply your city and its citizens with the above mentioned service on and after January 1st, 1921, for such time and upon such terms as may be agreed upon."

XX.

That the plaintiff City of Greensboro is controlled and managed by a commission form of government; that at the time the defendant Power Company presented to these Commissioners its application for a franchise, it requested that the matter be referred for determination to a popular election, called especially for that purpose, at which all of the duly qualified electors of said city might be permitted to express their will; that accordingly an election was so held, and resulted in a vote of 78 for granting the franchise, and 990 against granting the franchise.

XXI.

13 That plaintiffs and each of them, are advised that the defendant Power Company is in error in its claim and assertion that it owes no public duty whatsoever to continue to furnish power and current to the Public Service Company to operate its street car lines and to be re-sold to the cities and the citizens thereof. That plaintiffs on the contrary allege that upon the facts hereinbefore stated the defendant Power Company does owe a public duty to the North Carolina Public Service Company to continue to furnish it current and power to operate its street railway system, to be resold to the inhabitants of the two said municipalities, and to the said municipalities as their respective needs may require.

XXII.

That plaintiffs are advised and believe, that this precise question, determining the duty and obligation owed by the Defendant Power Company to these plaintiffs under like conditions, has heretofore been determined in an action between the Public Service Co., and this defendant in a case taken to the Supreme Court of North Carolina by the Defendant Power Company, upon a record of facts in all material respects like those herein set forth, and that the decision in that case is controlling, as between the parties to this proceeding.

XXIII.

That plaintiffs are advised and believe, and so allege that hydro-electric current is generated by the defendant in large quantities, and also purchased in great volume at much less cost than electric current can be generated by the use of coal; that the defendant purchases and receives under a single contract more hydro-electric current at the price of 4 mills per K. W. than it sells directly and indirectly to all municipalities issuing its current; and that it is now charging consumers for such current from 300 to 2150% profit.

XXIV.

That plaintiffs Cities of Greensboro and High Point as political sub-divisions of the State and their respective citizens are entitled to enjoy the benefits of cheap hydro-electric current in preference to the consumers of such current who by same solely for private use in industrial enterprises; that defendant recognized this right and claim when filing its petition for a franchise in the City of Greensboro. It stated: "Your petitioner recognizes its obligation to furnish your city and its citizens whatever electricity shall be needed for municipal and domestic consumption in preference to its customers, who only need or use the same for industrial purposes," the defendant having thus recognized this public obligation could not abridge or *qualifying* it by adding: "Providing your Honorable Board will grant it a franchise to enable it to discharge this public duty or obligation." That it is now discharging this public duty by selling current to the Public Service Company at wholesale for the use and benefit of the said municipalities and its citizens to their satisfaction.

XXV.

That these plaintiffs are advised and believe that the water powers developed by the defendant Power Company in Western North Carolina are natural resources, primarily belonging to the State, and that the State having granted to the Power Company its sovereign right eminent domain, thus to build and to connect its hydro-electric generating properties with Greensboro and High Point, that these plaintiffs and the inhabitants of both cities are entitled as a matter

of right to have this current and power made available to them at a reasonable rate, and without discrimination, and that they are entitled to such current and power based upon the reasonable cost of producing hydro-electric current, and not based upon the high cost of coal, which has to be shipped from other States.

XXVI.

That when the original contracts were made between the Power Company and the Public Service Company to furnish the latter necessary power and current to supply the needs of the city and citizens of both Greensboro and High Point, neither the Southern

Public Utilities Company nor the Piedmont and Northern
15 Railroad had been organized, and the plaintiffs are advised and believe that all of the obligations undertaken to furnish other public utility companies in North Carolina and municipalities as well, have been assured since the Power Company connected its system with the plaintiff Public Service Company and assumed the obligations herein set forth.

XXVII.

That since entering into the above-mentioned contracts, and long after the current was being sold and delivered thereunder, the defendant Power Company developed several water sites in North Carolina, and is now operating one hydro-electric plant in this State which alone generates more hydro-electric power than is consumed by all of the municipalities in North Carolina purchasing same, either directly or indirectly from it; that the Power Company also since the making of these contracts, erected within the city limits of Greensboro a large modern steam plant, which has a generating capacity of 10,000 horse power, and this plant is continually kept under a heat of steam and connects directly with the Power Company's transmission lines furnishing current to the Public Service Company at Greensboro and High Point.

XXVIII.

The Defendant Power Company has voluntarily elected to exercise its charter power to re-sell current to other utility companies engaged in the retail business of distributing same in various municipalities, made physical connections between its transmission line and those of each purchasing companies; that by so doing plaintiffs are advised and believe its property became effective with this charter of public use, and that the acts of the defendant in so doing was and is a declaration on its part to waive the primary right of independence, and imposes upon its property such a public duty for continued service that it can not now be disregarded.

XXIX.

16 That the plaintiffs City of Greensboro and City of High Point have a direct public and financial interest in the continuation of the service heretofore and now furnished the Public Service Company by the defendant Power Company; that relying upon the Public Service Company's right and ability to continue to obtain hydro-electric current from the Power Company, to be sold to its citizens desiring same for light and power, they each heretofore entered into favorable contracts with the Public Service Company to purchase from it current for the lighting of their public streets and other municipal purposes, and also granted it franchises to occupy the streets of said cities and invest the necessary capital nor making and extending the desired accommodations for the growing demand of the people of both of said cities.

XXX.

That the plaintiffs City of Greensboro and City of High Point have each in the past owned and operated their own electric properties; that from experience they have found it more satisfactory and cheaper to delegate these powers to a local public utility company, and that pursuant to this experience and resolve have granted franchises to the Public Service Company and invited it to invest its money in said municipalities, and so furnish the service undertaken by said franchises; that plaintiffs City of Greensboro and City of High Point are advised and believe that in order to secure the benefits of cheap hydro-electric current and power now being sold by the Power Company at their respective cities' edge through sub-stations to cotton mills and other manufacturing enterprises, that it is neither their legal nor moral duty to withdraw their support and cooperation from the Public Service Company, which is carrying out its contracts in good faith and performing its public duties to the satisfaction of said cities and its citizens, and grant another franchise to the Power Company, thus permitting it to encumber the streets of said cities with duplicate poles and wires and other equipment necessary to furnish adequate service to the said cities and its citizens. That plaintiffs City of Greensboro and City of High Point are advised that the defendant Power Company, under the circumstances herein set forth, will not be permitted to substitute its will for the will of
17 the citizens of said cities, and dictate to them to whom they shall grant valuable franchises, or how they shall be required to purchase hydro-electric current and power generated and sold by its Public Service Company.

XXXI.

That the defendant having formally notified the Public Service Company that it would cut off and discontinue service to it at Greensboro and High Point after January 1st, 1921, and later filing a similar notice with the plaintiff City of Greensboro, plaintiffs Cities

of Greensboro and High Point have joined in this proceeding in order to prevent the defendant from putting both cities in darkness, and to prevent the stopping of the street car service, and to protect the valuable property rights which the two cities hold under existing contracts which they now have with their co-plaintiff for lighting their streets and other service, and in every way possible to protect the citizens against loss and damage by such an act. That the declared purpose of the defendant to thus arbitrarily discontinue furnishing light and power to plaintiffs and the citizens of Greensboro and High Point is demoralizing business in both of said cities, preventing the establishing of new enterprises requiring light and power, and in many other ways entailing irreparable loss upon plaintiffs and the citizens of both municipalities; that these conditions will continue until the respective rights of the parties are judicially determined, and the resulting obligations observed.

XXXII.

That the plaintiff City of Greensboro avers that in order to protect itself and the citizens of said City in the enjoyment of cheap hydro-electric light and power that it ought not to be required to grant a valuable franchise to the defendant Power Company, a foreign corporation; that such a franchise would practically destroy the value of the plaintiff Public Service Company's property to both cities, and invite bankruptcy upon this Company; that the Public Service Company has always submitted itself to the regulations and rules of the municipality and the Corporation Commission governing
18 its relations with the said cities, while on the other hand, the defendant Power Company claims that its rates are subject to the rules and regulations of that Company. It now has on file with the State Corporation Commission a schedule of rates, in which it says; "The filing of these rates by the Company is in deference to the request of the Commission, and must not be treated or considered as done because any legal obligation is imposed upon it to file same; This company is advised that no legal obligation exists," That these plaintiffs do not desire to enter into a contract with, or to grant any franchise to the defendant, or, any other Public Service Company which is not unreservedly willing to submit to municipal, state and judicial supervision and control, and the citizens of Greensboro were, as said plaintiff is informed and believes, influenced to vote against granting a franchise to the defendant Power Company because they believe that the Power Company does not propose to submit to judicial and governmental control by the State until, and as, it is made to do so.

XXXIII.

That if defendant Power Company is permitted to cut off its current and discontinue furnishing same to the Public Service Company to operate its street cars and to light the streets of Greensboro and High Point, and to furnish the citizens thereof with light and power,

untold and irreparable damage will result to the plaintiffs and the citizens of said cities, and stagnation of business will follow, as plaintiff and each of them are now wholly at the mercy of the defendant Power Company monopoly for current with which to operate its street cars, light the streets of said cities, and to furnish light for the homes and power for industrial consumption by the citizens of said cities; that under the present abnormal market, transportation and building conditions, it is impossible for the plaintiff Public Service Company to construct by January 1st, even a steam plant with which to generate sufficient electric current and power to satisfy the demand of the plaintiffs, and it is utterly impossible for plaintiff to construct and operate a hydro-electric plant of sufficient capacity

to supply the needs of the plaintiffs. That the defendant
19 Power Company has already and now enjoys a monopoly in the ownership of all available hydro-electric sites accessible to Greensboro and High Point, and actually operates all developed hydro-electric plants accessible and available to Greensboro and High Point which are engaged in the sale of current to municipalities for domestic purposes.

XXXIV.

That the plaintiff Public Service Company is ready, able and willing to pay the Power Company a reasonable rate for all power and current required of it at Greensboro and High Point, and stands ready to continue to take same, if it is furnished without discrimination as to rates and service.

Wherefore, Plaintiffs pray for a writ of mandamus against the defendant Power Company, to compel it to continue to furnish electric current and power to the Public Service Company through its sub-stations at Greensboro and High Point, to operate the street car lines in both said cities, and for the use and benefit of the municipalities and the citizens thereof for light and power, as is now being furnished, and for the cost of this proceeding, but for no other relief. Brooks & Kelly, Roberson & Dalton, Attorneys for North Carolina Public Service Company. Chas. A. Hines, Attorney for City of Greensboro. Dred Peacock, Attorney for City of High Point.

NORTH CAROLINA,
Guilford County:

20 R. J. Hole first being duly sworn, deposes and says: That he is Vice-President and General Manager of the North Carolina Public Service Company, one of the plaintiffs herein; that he has read the foregoing complaint and that same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those, he believes it to be true. R. J. Hole

Sworn to and subscribed before me this 2nd day of September, 1920. J. T. B. Shaw, Notary Public. (Seal.) My Commission expires 2/10/1922.

Exhibit "A."

Letter from Southern Power Co. to C. B. Hole Dated Jan. 8, 1920.

Charlotte, N. C., January 8th, 1920.

Mr. C. B. Hole, Pres. North Carolina Public Service Company,
Greensboro, N. C.

DEAR SIR: With reference to our contract with your Company for furnishing it electric power at Greensboro, N. C., which will expire on January 10th, 1920, we beg to advise you that it will be impossible for us to enter into any additional contract with you for supplying you power at this point. As we have today written you with reference to power at High Point, N. C., The Southern Power Company does not contemplate the construction of any additional hydro-electric developments at any time in the near future and its present outstanding contracts fully cover all of the primary power which it can generate or acquire by means of its present facilities, and we cannot enter into additional contracts with anyone for the supply of primary power without impairing our ability to supply the requirements of our present customers.

21 Until such time, however, as you can put your Company in a position to generate your own power, if you desire us to do so, we will use our best endeavors to render you all the assistance in our power to enable you to continue to serve the citizens of Greensboro, but on condition that you forthwith begin and continue to operate your steam plant at Greensboro, N. C., so as to generate therefrom not less than 500 kilowatts as stipulated for in your existing contract, and immediately proceed to increase your plant facilities so as to be in a position within twelve months from this date to altogether supply your own power. During this period of twelve months, while we cannot obligate ourselves to furnish you a regular supply of power, we will, as stated, endeavor to the best of our ability to furnish you such power as may be necessary to supply your requirements at Greensboro over and above that which you shall be able to generate by the continuous operation of your own plant to its full capacity. We will supply you hydro-electric power at such times as we have a surplus of such power over and above the requirements of our present customers and will charge you therefor at the rate of six mills per kilowatt hour, which is our regular dump power rate. When we have no such surplus power which we can deliver to you, we hope to be able by the operation of our steam plant, beyond their normal use as auxiliary plants, to generate the necessary amount of power by steam, and when it is necessary, and when we shall be able to generate power by steam, we will charge you therefor at cost, but should our present customers, at any time, require the full output of

all our plants, both hydro-electric and steam, to meet their demands under their contracts with us, then, of course, we will have to give them preference, and you must in all events fully supply your own needs *without* one year from this date. Yours Very truly, Southern Power Company. Chas. I. Burkholder, General Manager.

Exhibit "B."

Letter from Southern Power Co. to C. B. Hole Dated Jan. 8 1920.

Charlotte, N. C., January 8, 1920.

Mr. C. B. Hole, Pres. North Carolina Public Service Co., Greensboro, N. C.

DEAR SIR: With reference to the negotiations which have taken place between our representative and you concerning the renewal of your contract for electric power at High Point, N. C., which expired on December 7th, 1919, we beg to advise you that the existing contract which we have outstanding with our customers cover all of the primary power which we can generate or acquire by means of our present facilities, so that it will be impossible for us to renew your contract or to undertake in any way to furnish you a regular supply of power at this point, and accordingly we must withdraw all offers to contract with you for such power. At the time our representative was negotiating with you, we contemplated the immediate construction of additional hydro-electric developments, which would have enabled us to supply your requirements, and pending their completion we were willing to undertake to supply you by purchasing dump power from other companies and by operating our steam plants beyond their normal operation as auxiliaries to our hydro-electric plants. But, since we have abandoned any purpose to construct any additional hydro-electric plants at any time in the near future, it is, of course necessary that we reserve our steam plants as auxiliaries to our hydro-electric plants in order not to impair our ability to discharge our existing contracts and supply the requirements of our present customers.

If you desire us to do so, we will however, use our best endeavors to render you all the assistance in our power to enable you to continue to serve the citizens of High Point, but on condition that you immediately take such steps as may be necessary to put your company in a position within twelve months from this date to altogether supply your own power. During this period of twelve months, while we cannot obligate ourselves to furnish you a regular supply of power, we will supply you hydro-electric power at such times as we have a surplus of such power over and above the requirements of our present customers, and when we have no such surplus which we can deliver to you we hope to be able, by the operation of our steam plants beyond their normal use as auxiliaries to generate the necessary amount of power by steam, but should our present customers at any time require the full output of all our

plants, both hydro-electric and steam, to meet their demands, under their contract with us, then, of course we will be bound to give them preference.

We will charge you for such dump hydro-electric power at the rate of 6¢ per K. W. H. which is our regular dump power rate, and when it is necessary and we shall be able to deliver you power generated by steam, we will charge you therefor at cost. Please understand, however, that you must in all events fully supply your own needs within twelve months from this date. Yours very truly, Southern Power Company, by Chas. I. Burkholder, General Manager.

Exhibit "C."

Letter from N. C. Public Service Co to Southern Power Co., Dated Jan. 27, 1920.

Greensboro, N. C., January 27, 1920.

Southern Power Company, Charlotte, N. C.

GENTLEMEN:

Attention Mr. Chas. I. Burkholder, General Manager.

Your letter of January 8th relating to our negotiations for the purchase of current and power at High Point was received in due course. I have delayed answering for two reasons: First, in the light of the recent decision of the Supreme Court of North Carolina between our Company and yours, I have been unable to understand just what you mean by this letter. Second, owing to the importance of the matter, and the apparent determination on your part to disregard the obligations which the Courts have decreed that you owe to this company, I deemed it advisable to submit the matter to my Board of Directors, which met yesterday.

In the outset, permit me to remind you that in all of the negotiations between us, extending over many months, with relation to your supplying of all the power and current needs of the North Carolina Public Service Company, it has been understood between your representatives and us that we proposed to continue to purchase current and power from you, and that we only objected to being charged a discriminatory rate, with equal emphasis, your representatives, both in conference and upon the hearing before Judge Shaw, stressed the fact that you had the current to sell and proposed to furnish it to us, but demanded the right in yourself to fix the rate.

This Company has been your consistent and dependant customer as its only and sole course of supply for current and power for the last ten years, and in High Point you dictated a provision in the contract expressly stipulating, among other things, as follows: "And said customer agrees to dismantle its present steam plant, and for the purpose of fixing the amount of power that said customer will take

from the said Power Company, said customer will take from said Power Company all necessary power to be used by it, sold or applied for the purpose in this paragraph mentioned."

Carrying out in good faith the conditions which you imposed, the plant at High Point was totally scrapped, and not a vestage remains. We, the City of High Point, and the consuming public dependant upon us, therefore have with your knowledge for ten years continuously depended and relied upon your service, and still do.

Prior to the rendition of the opinion of the Supreme Court above referred to, you furnished us a proposed contract covering the necessities of High Point for current and power, which you offered to continue for an additional period of ten years. This contract was not sighed by us, for the sole reason that you sought again to discriminate in rates against this Company. Pending our agreement to accept your proposal, we forwarded you a memoranda to be inserted in the contract, as follows:

25 It is understood that the scale of rates herein stipulated is made subject to any decision or ruling of the Courts or Corporation Commission affecting rates."

To this we have had no reply.

The Supreme Court of North Carolina in its recent decision in the Salisbury case announced that it was your duty to continue to furnish service to this Company, and without discrimination in rates. In the course of the Court's opinion it quotes with approval an opinion from the Corporation Commission of California, as follows:

"It is clearly the duty of the Public Utility, situated as is the petitioner, to apply every reasonable demand for service at non-discriminatory rates and under just terms and conditions. Nor can this duty be avoided, modified or abridged in any manner whatsoever, either by contract between the utility and any private interest or by the maintainance of unsuitable facilities. In case of a temporary insufficient supply of electric energy to meet all reasonable demands in the territory which petitioner has elected to serve, the available supply will, of course be pro-rated upon an equitable basis, consideration being given to the necessities of the public, irrespective of whether or not these necessities arise directly or thru the medium of another utility."

Commenting upon this rule, the Supreme Court says:

"The foregoing is a just and reasonable statement of the common law obligations resting upon public utility companies such as the defendant."

If you purpose, as we do, obeying and living up to the rule of action expressly prescribed by the Supreme Court, then we see no occasion to yield to the demands which you seem to make in your letter. If you do not purpose obeying the mandates of the Court and living up to the rules announced by it, will you not do us the favor to so advise, in order that we may be the more intelligently prepared to protect, not only our own interest, but the consuming public in High Point and Greensboro, who are solely dependent upon your

26 current and power for the lighting of every home, and operation of every street car, and many industrial activities giving employment to large numbers of laborers. Yours very truly,
North Carolina Public Service Company, by C. B. Hole, President.

Notice of Defendant for Removal to U. S. Court.

[Title omitted.]

To Messrs. Brooks & Kelly and Messrs. Roberson & Dalton, attorneys for the North Carolina Public Service Company, one of the plaintiffs in the above-entitled action, and Mr. Charles A. Hines, attorney for the City of Greensboro, one of the plaintiffs in the above-entitled action, and Mr. Dred Peacock, attorney for the City of High Point, one of the plaintiffs in the above-entitled action:

Please take notice, that the Southern Power Company, the defendant in the above entitled suit, will on the 11th day of September, A. D. 1920, at 3 o'clock, P. M., or as soon thereafter as counsel can be heard, move the Court for an order removing said suit to the District Court of the United States for the Western District of North Carolina, in accordance with the petition and bond of the defendant, copies of which are hereto attached.

Dated the 8th day of September, A. D. 1920. W. P. Bynum, Cansler & Cansler, W. S. O'B. Robinson, Jr., Attorneys for the Defendant.

27 Due service of the foregoing notice, together with the receipt of a copy thereof, as well as a copy of the petition and bond therein referred to is hereby admitted and accepted by each of us respectively.

This 8th day of September, A. D., 1920. A. L. Brooks & R. C. Kelly, Attorney- for the North Carolina Public Service Company. Dred Peacock, Attorney for the City of High Point. Chas. A. Hines, Attorney for the City of Greensboro.

Petition of the Southern Power Company to Remove This Cause to the United States District Court for the Western District of North Carolina.

[Title omitted.]

To the Honorable Superior Court of Guilford County, North Carolina:

The petition of the Southern Power Company appearing specially and for the sole and single purpose of presenting this petition respectfully shows:

I.

That heretofore, and on or about the 2nd day of September, A. D., 1920, the above entitled suit, which is a suit of the Civil nature,

was brought in this Court by North Carolina Public Service Company, City of Greensboro, and City of High Point, against
28 your petitioner as defendant. That the summons and complaint issued by the plaintiffs in said suit against your petitioner as defendant therein were served on your petitioner on or about the 3rd day of September, A. D. 1920, and are made returnable according to the terms of said summons, on the 14th day of September, A. D., 1920.

II.

That your petitioner, the Southern Power Company, defendant in said suit, at the time of the commencement thereof, was and has ever since been, and still is a foreign corporation, organized, created and existing under the laws of the State of New Jersey, and at all such times was, and still is, a citizen and resident of said State of New Jersey, and a non-resident of the State of North Carolina.

III.

That the plaintiffs, were each at the time of the commencement of, said suit and each has ever since been, and still is a corporation, organized, created and existing under the laws of the State of North Carolina and at all such times each was and still is, a citizen and resident of the State of North Carolina and of the Western District thereof, That the plaintiff North Carolina Public Service Company, at the time of the commencement of said suit was, and has ever since been, and still is a corporation organized, created and existing under the laws of the State of North Carolina, and at all such times was and still is a citizen and resident of the State of North Carolina and of the Western District thereof. That each of the other two plaintiffs, City of Greensboro and City of High Point, was at the time of the commencement of said suit, and has ever since been, and still is a municipal corporation duly chartered, created, organized and existing under the laws of the State of North Carolina, and at all such times each was, and still is a citizen and resident of the State of North Carolina and of the Western District thereof.

IV.

That said suit by the plaintiffs against your petitioner as
29 defendant, is a suit of the Civil nature, and matter in dispute and amount in controversy therein exceeded at the time of the commencement of said suit, and has ever since exceeded and still exceeds exclusive of interests and cost the sum of Three Thousand (\$3,000.00) Dollars.

V.

That the plaintiffs allege in their complaint filed herein, that heretofore to-wit, in August 1908, and in December 1909, your petitioner entered into written contracts with the North Carolina

Public Service Company, each extending for a period of ten (10) years from the respective dates thereof, to sell electricity to the plaintiff, North Carolina Public Service Company, for use as motives power in operating its street railway system and for resale in the respective municipalities of its co-plaintiffs, City of Greensboro and City of High Point; that heretofore and at or about the time of the expiration of said contracts, your petitioner notified the North Carolina Public Service Company in writing, that your petitioner would not after January 1st, 1921, furnish said North Carolina Public Service Company any further electricity for the use and purposes aforesaid, or for any other use or purpose, but would until January 1st, 1921, undertake to furnish same to said North Carolina Public Service Company in order that it might have this time in which to provide its own supply of electricity to furnish its own requirements and those of the said two municipalities, and that after said date your petitioner would cut off and entirely discontinue furnishing any electricity to said North Carolina Public Service Company, for use at Greensboro and High Point. It is alleged that if your petitioner is permitted to cut off its electricity and discontinue furnishing same to said Public Service Company for the uses and purposes aforesaid, after January 1st, 1921, untold and irreparable damage will result to the plaintiffs and stagnation of business will follow in said Cities, and that these conditions will continue until the respective rights of the parties are judicially determined.

It is further alleged that the plaintiffs, City of Greensboro and City of High Point have a direct public and financial interest in preventing your petitioner from discontinuing furnishing electricity to the plaintiff, North Carolina Public Service Company, in that they have each made favorable contracts with said North Carolina Public Service Company to furnish each electricity for the use of each and for the use of the citizens and inhabitants in each of said cities, and that said North Carolina Public Service Company will be unable to carry out and perform said contracts unless your petitioner is prevented from discontinuing the furnishing of electricity to said North Carolina Public Service Company, and it is further alleged that valuable property rights of said cities will be destroyed and loss and damage to the citizens and inhabitants thereof will follow, unless your petitioner is prevented from discontinuing the furnishing of said electricity to the North Carolina Public Service Company as it is now furnishing same, and the relief prayed for by the plaintiffs against your petitioner as defendant is that it be compelled and required to continue to furnish electric current and power to the North Carolina Public Service Company to operate the street car lines in both of said cities, and for the use and benefit of the municipalities and citizens thereof, for light and power, as it is now being furnished. That the amount of the electricity which the plaintiffs are seeking to require, and compel your petitioner as defendant to continue to furnish them, greatly exceeds in value the sum of Three Thousand (\$3,000.00) Dollars exclusive of interest and the cost of this ac-

tion, and also the matter in dispute to-wit: whether your petitioner can be required and compelled to continue to furnish electricity to the North Carolina Public Service Company for the uses and purposes hereinbefore alleged, exceeds in value the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and cost. That your petitioner, defendant in said suit, disputes and denies the alleged cause of action of the plaintiffs and all claims and demands made by them or either of them therein. That the controversy in this suit and every issue of fact and law therein, was at the time of the commencement thereof, and has ever since been and still is wholly between citizens of different states and could at all such times and still can be fully determined as between them, that is to say, between the plaintiffs and your petitioner, the defendant in this suit.

31

VI.

That said suit is pending undetermined in this Court, and the time has not yet arrived at which your petitioner is required by the Laws of the State of North Carolina, or the rules of the Superior Court of the State of North Carolina in which said suit is brought, to answer or plead to the complaint of the plaintiffs, and that no application has heretofore been made to any Court or Judge for the order to be applied for upon this petition.

Wherefore, your petitioner makes and files with this petition a bond with good and sufficient surety as provided by statute in such cases for its entering a certified copy of the record in this suit in the District Court of the United States for the Western District of North Carolina within thirty (30) days from the filing of this petition and for the payment of such costs that may be awarded herein by said District Court of the United States, if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and your petitioner prays this Honorable Court to proceed no further herein except to make the order of removal as required by law and to accept said bond presented herewith, and to cause a transcript of the record herein to be duly made and transmitted to the United States District Court for the Western District of North Carolina. Southern Power Company, by E. C. Marshall, Asst. Secy. & Asst. Treas. W. P. Bynum, Cansler & Cansler, W. S. O. B. Robinson, Jr., Attorneys for Petitioner, Southern Power Company.

STATE OF NORTH CAROLINA,
County of Mecklenburg:

E. C. Marshall, being duly sworn, deposes and says: That he is an officer of the Southern Power Company, defendant in the above entitled suit and the petitioner named in the foregoing petition, to-wit: its Asst. Secretary that he has read the foregoing petition and knows the contents thereof, and the same is true of his own knowledge except as to those matters

32

therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. E. C. Marshall.

Sworn to and subscribed before me this the 8th day of September, A. D., 1920. D. C. Carmichael, Notary Public, Mecklenburg County, N. C. (Seal.) My Commission expires August 10th, 1922.

Bond for the Removal of This Cause to the United States District Court for the Western District of North Carolina.

[Title omitted.]

Know all men by these presents: That Southern Power Company as principal and E. R. Beecher and Chas. I. Burkholder as sureties, are held and firmly bound unto North Carolina Public Service Company, City of Greensboro and City of High Point, and all other persons whom it may concern, in the sum of Five Hundred (\$500.00) Dollars for the payment of which well and truly to be made, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these present.

Yet upon these conditions: The said Southern Power Company, having petitioned the Superior Court of Guilford County, 33 in the State of North Carolina, for the removal of a certain cause pending in the Superior Court of said County, wherein North Carolina Public Service Company, City of Greensboro and City of High Point, are the plaintiffs and the Southern Power Company is defendant, to the District Court of the United States for the Western District of North Carolina, for further proceedings on the grounds in said petition set forth.

Now, therefore, if the Southern Power Company, the petitioner, shall enter into the said District Court of the United States within thirty days after the date of filing of said petition, a certified copy of the record in such suit, and shall well and truly pay all costs that may be awarded by the said District Court of the United States if the said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

Witness our hands and seals this the 8th day of September, A. D. 1920. Southern Power Company, by E. C. Marshall, E. R. Beecher (Seal), Chas. I. Burkholder. (Seal.)

STATE OF NORTH CAROLINA,
County of Mecklenburg:

E. R. Beecher, and Chas. I. Burkholder the sureties named in the foregoing bond being first duly sworn each for himself, deposes and says as follows; I am the same person whose name is subscribed to the foregoing bond and I am a resident and freeholder of the County and State aforesaid, and I am worth double the sum of Five Hundred (\$500.00) Dollars, named therein, as the penalty thereof over

and above all my just debts and liabilities and exclusive of property which is exempt from execution. E. R. Beecher. Chas. I. Burkholder.

34 Sworn to and subscribed to before me this 8 day of September A. D., 1920. O. C. Carmichael, Notary Public, Mechenburg County, N. C. (Seal.) My commission expires August 10th, 1922.

Order Refusing to Grant Petition for Removal.

[Title omitted.]

This cause coming on to be heard before His Honor J. Bis Ray, Judge presiding over and holding the Superior Court in the County of Guilford, North Carolina, on this the 11th day of September, 1920, upon the petition and bond of the defendant for the removal of this action to the United States District Court for the Western District of North Carolina, pursuant to written notice duly given the plaintiffs, and the Court being of the opinion, after inspecting the said petition and bond and complaint and hearing argument, that the said bond is duly conditioned and in every respect good and sufficient and the said petition is in due form and otherwise legally sufficient, refuses and declines, however, to allow said petition and to order the action removed to the said United States District Court for the Western District of North Carolina, as prayed for in the petition, upon the ground that the complaint filed herein by the plaintiffs states a case in which a writ of mandamus may properly issue and the United States District Court has therefore no original jurisdiction of such a case and could not entertain jurisdiction of the action as set forth in the complaint, and that this Court has jurisdiction.

To the Court's refusal to grant the said petition and to order the removal of the said case to the United States District Court,
35 as prayed for, the defendant in apt time duly excepted and its exception is hereby granted and allowed.

This the 11th day of September, 1920. J. Bis Ray.

Clerk's Certificate With Record.

[Title omitted.]

I, M. W. Gant, Clerk of the Superior Court of Guilford County, State of North Carolina, hereby certify the above and foregoing to be a full, true and correct copy of the record and the whole thereof in the above entitled suit heretofore pending in said Superior Court, wherein North Carolina Public Service Company, City of Greensboro and City of High Point are plaintiffs and Southern Power Company is defendant, said record consisting of the Summons, Sheriff's Return of Service thereof, Plaintiffs' prosecution bond, Complaint of the plaintiffs, the Petition for the Removal of said suit to

the United States District Court for the Western District of North Carolina, the Bond for Removal, the Notice of said Petition and Bond and Acceptance of Service of said Notice, which said petition, bond and notice thereof and acceptance of service of said notice were duly filed in this Court subsequent to the giving of the said notice and which said petition and bond were duly presented to the presiding Judge of this Court at the time stated in the said notice, and the order of His Honor J. Bis Ray, Presiding Judge of this Court, refusing to grant the said petition and to order the removal of this action to the said United States District Court for the Western District of North Carolina, all as appear and remain on file and of record in my office.

36 In witness whereof, I have hereunto set my hand and affixed my official seal this the 14th day of September, A. D., 1920.
M. W. Gant, Clerk of the Superior Court of Guilford County, North Carolina. (Seal.)

Notice of Removal.

Filed Sept. 15, 1920.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO, and CITY OF HIGH POINT, Plaintiffs,

vs.

SOUTHERN POWER COMPANY, Defendant.

To the above plaintiffs and to Messrs. Brooks and Kelly, attorneys for the North Carolina Public Service Company; Mr. Charles A. Hines, attorney for the City of Greensboro, and Mr. Dred Peacock, attorney for the City of High Point:

You and each of you will please take notice that on the 15th day of September 1920, the above entitled cause was duly transferred from the Superior Court of the County of Guilford, State of North Carolina, to the District Court of the United States in and for the Western District of North Carolina, and that the record in the said cause has this day been duly filed in the said United States District Court at Greensboro in said District.

Dated at Greensboro, N. C., this the 15th day of September, 1920.
W. P. Bynum, Cansler & Cansler, Broadhurst & Cox, W. S. O'B. Robinson, Jr., Attorneys for Southern Power Co., Defendant.

37 Received Sept. 15, 1920. Executed Sept. 15, 1920, as to Brooks & Kelly, Attys. for N. C. Public Service Co., by reading the within Notice of Removal to and leaving copy of same with R. C. Kelly. As to City of Greensboro by reading the within

Notice of removal to and leaving a copy of same with C. A. Hines, Atty. of record for City of Greensboro. As to City of High Point by reading the within Notice of Removal to and leaving a copy of same with Dred Peacock, Atty. of Record for City of High Point. Chas. A. Webb, U. S. Marshal, by C. T. Roane, D. M.

Order Allowing Defendants Additional Time to Answer.

[Title omitted.]

Upon motion of Counsel for the defendant in the above entitled suit that the defendant be allowed additional time within which to file its Answer to the Bill of Complaint of the plaintiffs.

It is ordered that the defendant be, and it is hereby allowed until and including October 25, 1920, within which to file its Answer to the Bill of Complaint of the plaintiffs in the above entitled suit which was heretofore removed to this Court from the Superior Court of Guilford County, North Carolina.

The Clerk at Greensboro will enter this order.

This the 12th day of October, A. D. 1920. Jas. E. Boyd, U. S. Judge.

38

Answer.

[Filed Octo. 23, 1920.]

[Title omitted.]

Now comes the defendant The Southern Power Company and for an answer to the bill of complaint of the plaintiffs herein answering shows:

I.

That the allegations of paragraph one of the complaint are admitted.

II.

That the allegations of paragraph two of the complaint are admitted. The defendant further alleges that the plaintiff, North Carolina Public Service Company, is a public service corporation, fully authorized and empowered by its charter to generate electricity either by steam or water and to sell and distribute same, and that said North Carolina Public Service Company owes to its co-plaintiffs, City of Greensboro and City of High Point, and the citizens and inhabitants of each of said cities, the duty of generating and distributing to them electricity for lighting, heating and power purposes.

III.

That the allegations of paragraph three of the complaint are admitted, except in so far as it is alleged that the North Carolina Public Service Company, has for a number of years past and still

furnishes, in the City of High Point, current for the lighting of the streets, public buildings, parks, etc., of said City, and
39 sells and distributes current for light and power to the various inhabitants thereof which, as defendant is informed and believes, is untrue and is therefore denied, the truth being as this defendant is informed and believes, that the North Carolina Public Service Company sells electricity at wholesale to the City of High Point for lighting its streets and other public places, and for resale and distribution to its citizens and inhabitants for lighting, heating and power purposes.

IV.

That the allegations of paragraph four of the complaint are admitted, except in so far as it is alleged that this defendant is engaged in the wholesale distribution of current for profit, which is denied, the truth being that while this defendant has in a few instances made special contracts for what may be termed the wholesale of power in limited amounts and for limited period, and upon the particular terms and conditions set forth in such contracts, the wholesale distribution of current is not and has never been, any part of the defendant's business as a public service corporation, and that except in the few instances referred to, the defendant has always sold and distributed, and still sells and distributes its electric current and power directly to the users and consumers thereof, and its duties as such, and this defendant's obligations as a public service corporation in respect to the sale and distribution of electricity are owed alone to the actual users and consumers of such electricity, and as it is advised and believes, it is under no obligation to sell electricity to the plaintiff, North Carolina Public Service Company, for the uses and purposes for which said North Carolina Public Service Company is demanding same in this suit.

V.

That the allegations of paragraph five of the complaint are admitted, except that it is denied that the Agents of this defendant in charge of its sub-stations keep records by means of separate meters of the amount of electric power furnished each customer from such
40 sub-stations, the truth being that this defendant has the meters which measure the amounts of power used by its respective customers, read by meter readers who have nothing to do with the maintenance, control or operation of its sub-stations, and except that it is denied that this defendant owns more than one dam or hydro-electric power plant in the State of North Carolina. It has, however, a contract with another generating company which owns a hydro-electric plant located in the State of North Carolina, for the purchase of electricity generated from said plant.

VI.

That answering paragraph six of the complaint, the defendant alleges that the capacity of its generating plants are not rated or

calculated in horse power, but in kilowatt hours, for the reason that on account of the variations in the flow of the streams upon which its hydro-electric plants and those of its allied companies are located, it is impossible to rate or calculate the capacity thereof in horse power, nor is the defendant's electric power and current sold by horse power, but by kilowatt hours. That during the year 1919, which is certainly representative of the defendant's business, except that during said year it both generated and sold in North Carolina, more electricity than during the former years, there was generated in the State of North Carolina, by the defendant and the other generating company with which it has a contract for the regular purchase of power, 93,885,300 kilowatt hours of electricity by water and 27,991,000 kilowatt hours of electricity by steam, and there was purchased in North Carolina by the defendant from time to time as it could acquire it, 5,461,368 kilowatt hours of electricity, making the total amount of electricity acquired by the defendant in State of North Carolina, during the year 1919, 127,337,668 kilowatt hours of electricity. That during the year 1919, this defendant distributed to its customers in the State of North Carolina 418,915,389 kilowatt hours of electricity, and upon which there was a line loss incident to the distribution thereof, of 72,899,411 kilowatt hours for which the defendant received no compensation whatsoever, leaving the net amount actually delivered to customers in

41 North Carolina, during the year 1919, 346,015,978 kilowatt hours, with result that it was necessary for this defendant, in order to fulfill its contracts with its customers in the State of North Carolina, during the year 1919, to transport into this State from other states 29,577,721 kilowatt hours of electricity. That during the year 1919, this defendant sold and delivered to the plaintiff, North Carolina Public Service Company for use at Greensboro and High Point, 12,144,100 kilowatt hours of electricity. That during the year 1919, this defendant sold and delivered to the Southern Public Utilities Company and to municipalities for light and power 35,768,260 kilowatt hours of electricity. That except as herein expressly admitted, the allegations of paragraph six of the complaint are untrue and denied.

VII.

That the allegations of paragraph seven of the complaint are admitted, except in so far as it is alleged that this defendant has a sub-station at Graham, North Carolina, which is denied.

VIII.

That answering paragraph eight of the complaint it is denied that this defendants enjoys a monopoly of the markets to or through which its lines extend. It is admitted that this defendant as a public service corporation, enjoys the right and exercises the power of eminent domain, and that it owes to the consuming public, who are entitled to demand service from it, the duty to render such service impartially and without discrimination, so as to grant equal rights

to all and special privileges to none. This defendant expressly alleges that it owes no duty to the plaintiff, North Carolina Public Service Company, for the reason that said North Carolina Public Service Company is itself a public service corporation and as such has and enjoys the same powers and privileges as this defendant, is subject to the same obligations and owes the same duties to the public and is in competition with this defendant in the sale and distribution of electricity. That the plaintiffs, City of Greensboro, and City

42 of High Point, have never requested or demanded service from this defendant, and neither has ever granted or offered to grant to this defendant, the privilege or franchise to sell and distribute electricity in their respective municipalities. That if said cities, or either of them, desire service from this defendant, this defendant is ready and willing to render such service to said cities and to their respective citizens and inhabitants, if they or either of them will grant to this defendant the necessary authority under which to perform such service. That as this defendant is advised and believes, it is under no obligation to serve said cities or either of them, or their respective citizens and inhabitants through the medium of the North Carolina Public Service Company. That except as herein expressly admitted, the allegations of paragraph eight of the complaint are untrue and denied.

IX.

That answering paragraph nine of the complaint, this defendant expressly denies that it ever at any time gave any assurances to the plaintiff, North Carolina Public Service Company, or made any representations of any nature whatsoever to it or had any agreement with it with reference to furnishing it electricity, other than as contained in those certain written contracts with the predecessors in title of said North Carolina Public Service Company, hereinafter in this answer referred to, and to which said contracts this defendant craves leave to refer as often as may be desired. That as will appear by reference to said contracts, the terms and conditions under which this defendant undertook to sell and deliver electricity to the predecessors in title of said North Carolina Public Service Company were expressly and particularly prescribed, limited and fixed and there is not, nor has been any agreement or undertaking on the part of this defendant to sell and deliver electricity to said North Carolina Public Service Company, except as contained in said special written contracts. That at the time said contracts were entered into, this defendant believes that the purchasers of electricity thereunder, considered that the price charged for said electricity by this defendant was less than the cost at which said purchasers could themselves, generate electricity from coal. That after the plaintiff, North

43 Carolina Public Service Company bought out its respective predecessors, in the Cities of Greensboro and High Point, to-wit: Greensboro Electric Company and High Point Electric Power Company, with whom this defendant had said contracts as herein-after stated for the sale of electricity, and to which said contracts the

North Carolina Public Service Company succeeded, said North Carolina Public Service Company began and continued to complain to this defendant of the price charged by it for electricity under said contracts, and represented to this defendant that it could generate electricity from coal cheaper than it could purchase it from this defendant, and that it proposed to do so and to discontinue purchasing electricity from this defendant. Said North Carolina Public Service Company also represented to this defendant that it proposed to build an hydro-electric plant from which to generate its own supply of electricity, and went so far as to exhibit to the representatives of this defendant some of its plans for the construction of such hydro-electric plant. This defendant denies that it possesses in the territory referred to in the complaint, a monopoly of the hydro-electric power market and also denies that there is no other source than this defendant from which the plaintiffs can obtain electricity for the purposes stated in the complaint. In this connection, the defendant alleges that in the contract previously existing between it and the Greensboro Electric Company, predecessors of the plaintiff North Carolina Public Service Company in the City of Greensboro, it was provided that said Greensboro Electric Company, at all times, should continue to maintain its steam plant at Greensboro and should operate the same at certain hours during the day whenever called upon so to do by this defendant. That except as herein expressly admitted, the allegations of paragraph nine of the complaint are untrue and denied.

X.

That answering paragraph ten of the complaint, it is alleged that this defendant, under and by virtue of its articles of incorporation, in addition to the power of manufacture, generate, sell and distribute to the consuming public, electricity for lighting, heating and
44 power purposes is given the power "to dispose of to such person or persons, corporation or corporations, and for such price or prices and on such terms and conditions as to the corporation (this defendant) may seem proper, electrical and other power for the generation, distribution and supply of electricity for light, heat and power and for any other uses and purposes to which the same are adapted," that acting under this permission contained in its articles of incorporation, this defendant has in a few instances, entered into special contracts with other Public Service Companies to sell them limited quantities of electricity at the prices and for the periods and upon the terms and conditions stated in such special contracts. It is admitted that in August, 1908, this defendant entered into the contract with the Salisbury and Spencer Railway Company referred to in said paragraph of the complaint and that about 1914 it entered into a contract with the Southern Public Utilities Company for the sale of electricity to it, which electricity said Public Utilities Company is reselling for domestic light and power purposes. That this defendant expressly denies that it has ever dedicated its property or business to the use or purpose of selling electricity to other public service corporations for resale and distribution, or that it has ever

undertaken or assumed any obligation of any nature whatsoever to sell electricity to other public service corporations, except under and pursuant to the terms of special contracts, which it has in several instances made with such other public service corporations for the sale of electricity. That except as herein expressly admitted, the allegations of paragraph ten of the complaint are untrue and denied.

XI.

That answering paragraph eleven of the complaint it is admitted that on the 21st day of November, 1908, this defendant made and entered into a contract with the High Point Electric Power Company, predecessor of the North Carolina Public Service Company, for the sale of electricity in amounts not to exceed at any one time 1,200 kilowatts for the uses and purposes, and upon the express terms and conditions stated in said contract, to which said contracts reference is hereby made for more particularity, in respect
45 to its said terms and conditions, and the defendant craves leave to refer to same as often as may be desired. It is admitted that said contract contained the clause quoted in said paragraph of the complaint, and it is further expressly alleged that it contained the following provision, "All contracts made by said consumer (High Point Electric Power Company), for such retailing of said electric power, shall be subject to this contract and the liability of the Power Company for any purpose shall not be construed to extend to any other person or corporation, other than said consumer." That except as herein expressly admitted, the allegations of paragraph eleven of the complaint are untrue and denied.

XII.

That answering paragraph twelve of the complaint it is admitted that on or about the 23rd day of December, 1908, this defendant made and entered into a contract with the Greensboro Electric Company, predecessor of the North Carolina Public Service Company, for the sale of electricity for the uses and purposes, and upon the express terms and conditions stated in said contract in amounts not exceeding at any one time 3,000 kilowatts, and to which contract express reference is made for more particularity in respect to its terms and conditions, and this defendant craves leave to refer to same as often as may be desired. That it was expressly provided in said contract as follows: "Provided all contracts made by said consumer (Greensboro Electric Company), for such retailing of said electric power shall be subject to this contract and the liability of the Power Company for any purpose shall not be construed to extend to any other person or corporation than the said consumer." And was further provided: "In consideration of the low rate at which power is to be delivered under this contract, the consumer (Greensboro Electric Company) agrees that its steam plant of 500 kilowatts capacity will be kept at all times in readiness, to be put in operation and that it will operate same any afternoon between

the hours of four o'clock P. M. and seven o'clock P. M. upon notice from the said Power Company, to furnish power either to
46 itself or to said Power Company, or in case of accident or emergency said consumer agrees to put said steam plant in operation to supply its own demands or the demands of the Power Company up to 500 kilowatts capacity. Any and all power so furnished to said Power Company shall be paid for by said Power Company at the rate of 1.1c per kilowatt hour, and shall be delivered in the same manner as power is delivered to the said consumer under the terms of this contract." That as this defendant is informed and believes, the requirements for current in the cities of Greensboro and High Point are approximately as stated in said paragraph of the complaint. That except as herein expressly admitted, the allegations of said paragraph twelve of the complaint are untrue and denied.

XIII.

That answering paragraph thirteen of the complaint, it is admitted that sometime prior to the expiration of the contract referred to in said paragraph, negotiations took place between the plaintiff, North Carolina Public Service Company and this defendant with respect to entering into new contracts for the sale of electricity at Greensboro and High Point, and that in such negotiations this defendant through its representative, advised said North Carolina Public Service Company that in the event said contracts were entered into, it could not enter into same for a less period than five years, and that on account of the increased cost and expense to this defendant of the generation and distribution of electricity over the cost and expense at the time said former contracts were made, it would be necessary for this defendant to charge and receive for said electricity, a higher rate than the rate charged under said former contracts. That said North Carolina Public Service Company declined and refused to enter into new contracts with this defendant for the purchase of electricity at Greensboro and High Point, and stated that it could generate its own supply of electricity either from coal or by the development of a hydro-electric plant cheaper than it could purchase the same from this defendant, and that it did propose to generate
47 its own supply of electricity either by building a steam plant or an hydro-electric power plant. That except as herein expressly admitted, the allegations of said paragraph of the complaint are untrue and denied.

XIV.

That answering paragraph fourteen of the complaint, it is admitted that J. B. Duke is President of this defendant company, and one of the principal owners of stock. It is also admitted as this defendant is informed and believes, that said J. B. Duke owns stock in several companies operating cotton mills in North and South Carolina, some of which said mills are furnished electricity by this defendant, but as this defendant is further informed and believes,

said J. B. Duke does not control the management and policy of any of said cotton mill companies, that the mills in which said J. B. Duke is interested, constitute only a very small part of the cotton mills to which this defendant furnishes electricity; that in fixing the rates and terms of the contracts under which it furnishes electricity to cotton mills, this defendant is not influenced in any way whatsoever, by any interests said Duke may have in the cotton mill industry, and it sells electricity at identically the same rates and upon identically the same terms to all cotton mills, irrespective of the fact of whether said Duke is interested in them or not. That the defendant is selling electricity to cotton mills at a lower rate than it would have been willing to sell same to the North Carolina Public Service Company, had it entered into new contract with said Company for the sale of electricity to it at Greensboro and High Point at the time referred to in the complaint, but it is denied that said sales of electricity to cotton mills are made under substantially similar conditions to those obtaining or which would have obtained at Greensboro and High Point had such new contracts been entered into. That the conditions under which electricity is sold to cotton mill differed very materially from those under which it is sold to a public service company for resale and distribution, particularly in that the amount of electricity consumed by a cotton mill is at all times while the mill is being operated, practically uniform, is consumed with regularity for at most only six days in a week, whereas, the amount required by a public service company for resale to the public varies very materially from time to time, the consumption is irregular and the service is continuous with the result that it is necessary for the producing company to be prepared at all times to supply the maximum amount of power that may be required, although it only receives compensation for the amount actually consumed. That except as herein expressly admitted, the allegations of paragraph fourteen of the complaint are untrue and denied.

XV.

That answering paragraph fifteen of the complaint, it is admitted that said J. B. Duke is interested in the Southern Public Utilities Company, which was incorporated as stated in the complaint, and thereafter acquired and now owns the franchises therein referred to, and that it is engaged in reselling electricity in the municipalities stated in said paragraph of the complaint, which electricity it purchases from this defendant, and that this defendant entered into a contract with said Public Utilities Company for the sale of said electricity to it, at a rate which was at the time the said contract was made, fair and reasonable and the same as this defendant would, in all probability at said time have charged the plaintiff, North Carolina Public Service Company, if it had then entered into a contract with it, but somewhat less than this defendant would have charged said Public Service Company had it entered into a contract with

it for the sale of electricity, at or about the time of the expiration of the contracts heretofore referred to in answer to paragraphs eleven and twelve of the complaint, due to the fact that in the meantime there had been a very substantial increase in the cost and expense of generating and distributing electricity. It is further admitted that this defendant's sub-stations at Greensboro and High Point are substantially of the kind and character referred to in paragraph fifteen of the complaint. That except as herein expressly admitted, the allegations of paragraph fifteen of the complaint are untrue and denied.

49

XVI.

That answering paragraph sixteen of the complaint it is admitted as this defendant is informed and believes, that J. B. Duke is interested in the Piedmont & Northern Railway Company which was incorporated in the State of South Carolina, in 1911, and now owns and operates by electricity a line of railroad extending from Charlotte to Gastonia in the State of North Carolina, and that it is a standard gauge railroad and transports with regularity freight and passengers and interchanges freight with steam railroads, and has its general offices in Charlotte, North Carolina, and that this defendant has for several years past, and still sells it certain electric current and power which it uses to operate its said railroad. That except as herein expressly admitted, the allegations of paragraph sixteen of the complaint are untrue and denied.

XVII.

That answering paragraph seventeen of the complaint it is admitted that on January 8th, 1920, this defendant wrote the North Carolina Public Service Company the letters therein referred to, giving it the notice therein stated, as more fully appears by reference to said letters which are attached to and made a part of plaintiffs' complaint, and it is also admitted that this defendant received the plaintiffs' letter on January 27th, 1920, likewise attached to and made a part of plaintiffs' complaint. That except as herein expressly admitted the allegations of paragraph seventeen of the complaint are untrue and denied, and particularly is denied that this defendant has ever at any time treated said North Carolina Public Service Company unfairly or unjustly.

XVIII.

That paragraph eighteen of the complaint is admitted.

XIX.

That paragraph nineteen of the complaint is admitted.

50

XX.

That paragraph twenty of the complaint is admitted, and in this connection, this defendant alleges that under the charter of the City of Greensboro it was required that said franchise be submitted to the voters for their approval as a condition precedent to the granting thereof. The defendant expressly pleads and craves leave to refer to its application or petition to the City of Greensboro for a franchise and to the proposed franchise which was submitted to the voters of said City.

XXI.

That answering paragraph twenty-one of the complaint, this defendant has no knowledge or information as to the advice which the plaintiffs may have received in respect to the subject referred to in said paragraph of the complaint, but as it is advised and believes said advice if given to the plaintiffs, was and is erroneous and incorrect. This defendant denies that it owes the North Carolina Public Service Company any duty whatsoever to furnish or to continue to furnish it electric currents and power for the purposes for which the same is demanded in this suit. It further denies that it is under duty to either the City of Greensboro or the City of High Point to furnish either electricity through the medium of the North Carolina Public Service Company, and alleges, as it is advised and believes that if either of said Cities desire electricity from this defendant it is entitled to furnish same to said Cities and to their respective citizens and inhabitants directly and not through the medium of the North Carolina Public Service Company. That except as herein expressly admitted, the allegations of said paragraph of the complaint are untrue and denied.

XXII.

That answering paragraph twenty-two of the complaint this defendant has no knowledge or information as to any advice which the plaintiffs may have received in respect to the subject referred to in said paragraph of the complaint, but if the plaintiffs have been advised as therein stated, said advice is erroneous and incorrect. This defendant denies that the case therein referred to, as presented to the Supreme Court of North Carolina, was presented upon a record of facts similar or substantially similar to the facts presented in this case, and further denies that the decision of the Supreme Court of North Carolina in the case referred to is controlling as between the parties to this proceeding, except in so far as the Supreme Court of North Carolina decided and held that this defendant cannot be required to sell electricity to a competitor for the purpose of its being resold in competition with this defendant and except in so far as it may be inferred from said decision that the said Supreme Court of North Carolina, decided and

held that this defendant cannot be required to serve the consuming public through the medium of another public service corporation when it is ready and willing to render such service directly to the consuming public.

XXIII.

That answering paragraph twenty-three of the complaint this defendant admits that it costs it more to generate electricity by coal than it does by water and in this connection alleges that as will appear by the allegations of this answer, in answer to paragraph six of the complaint, during the year 1919 this defendant was required, in order to comply with its contracts for the sale of electricity in North Carolina, to generate by coal approximately 28,000,000 kilowatt hours of electricity, and that if the defendant should be required, in addition to generating electricity for its own customers and for the purpose of prosecuting its own business, also to generate same for the North Carolina Public Service Company to resell at a profit to its customers and to prosecute its business, it would have to generate such electricity as it should be required to furnish to the North Carolina Public Service Company by coal, unless it could arrange to purchase same by contract from other generating companies. That as will appear by reference to charter of said North Carolina Public Service Company (Private Laws of 1909, Chapter 24, which is hereby expressly pleaded,) said North Carolina Public

52 Service Company is itself authorized and empowered to manufacture and generate electricity either by water or by coal, and this defendant alleges that since said North Carolina Public Service Company, by the acceptance of said charter, undertook to serve the public, and particularly by the acceptance of franchises in the cities of Greensboro and High Point, undertook to serve said cities and their citizens and inhabitants, it is its duty to do so, and to cease its attempt to interfere with this defendant in the proper and legitimate prosecution of its business, and not to continue to embarrass and injure this defendant in its ability to adequately serve the consuming public it has undertaken to serve. That except as herein expressly admitted, the allegations of paragraph twenty-three of the complaint are untrue and denied.

XXIV.

That answering paragraph twenty-four of the complaint this defendant admits that as it is advised and believes, should either of said Cities of Greensboro and High Point grant it a franchise, empowering it to sell electricity to said Cities and to their citizens and inhabitants for municipal lighting and domestic purposes, it would probably be held to be the law that such service should be given priority over service for industrial purposes, and this defendant so stated in its petition to the City of Greensboro for a franchise. This defendant expressly denies, however, that it can be required or compelled to furnish electricity to the City of Greensboro or the City of High Point or to the citizens and inhabitants of either of said

Cities, through the medium of the North Carolina Public Service Company. This defendant admits that it is now selling electricity to the North Carolina Public Service Company at wholesale for resale in the Cities of Greensboro and High Point, and alleges that it is doing so in accordance with its two letters dated January 8th, 1920, copies of which are attached to the complaint of the plaintiffs, and for the reasons stated in said letters. That except as herein expressly admitted, the allegations of paragraph twenty-four of the complaint are untrue and denied.

53

XXV.

That as this defendant is advised and believes, the allegations of paragraph twenty-five of the complaint are irrelevant and immaterial, in that they are statements of alleged conclusions of law, and this defendant expressly reserves the right to move that said paragraph of the complaint be stricken out. That neither the City of Greensboro nor the City of High Point, nor the citizens and inhabitants of either of said cities, have ever requested or demanded of this defendant that it sell either of them, any electric current or power. That this defendant admits that if it held a franchise in either of said cities, and had undertaken to serve either of said cities and its citizens and inhabitants, it would be its duty to serve them at a reasonable rate and without discrimination. That except as herein expressly admitted, the allegations of paragraph twenty-five of the complaint are untrue and denied, and this defendant expressly pleads that it is ready and willing to serve said cities or either of them upon being granted a franchise by them or either of them authorizing so to do.

XXVI.

That answering paragraph twenty-six of the complaint, it is admitted that neither the Southern Public Utilities Company nor the Piedmont and Northern Railway Company had been organized when the contracts hereinbefore referred to were entered into between this defendant and the predecessors in title of the North Carolina Public Service Company, High Point Electric Power Company and the Greensboro Electric Company. That except as herein expressly admitted, the allegations of paragraph twenty-six of the complaint are untrue and denied.

XXVII.

That answering paragraph twenty-seven of the complaint it is admitted that since this defendant entered into the contracts hereinbefore referred to, with the predecessors of the North Carolina Public Service Company at Greensboro and High Point this defendant has constructed its Lookout Shoals hydro-electric power plant, from which there is probably generated more hydro-electric power than is consumed by the municipalities in this State, using its power, and also that since these contracts were en-

tered into, it has constructed an auxiliary steam plant at Greensboro, which has a generating capacity of approximately 10,000 horse power, and that this steam plant is usually kept in condition to be put in operation in the event of a break-down on the defendant's system or other emergency. That except as herein expressly admitted, the allegations of paragraph twenty-seven of the complaint are untrue and denied.

XXVIII.

That the allegations of a paragraph twenty-eight of the complaint are untrue and denied, except that it is admitted as hereinbefore alleged, that in several instances this defendant has made special contracts with other Public Service Companies for the sale of electricity in the amounts and upon the special terms and conditions set forth in such contracts, and that in such instances the necessary connections between the defendant's wires and those of the purchasing companies were made to permit of the delivery of the electricity sold. It is expressly denied that this defendant's property or business has ever become affected with the public use of selling electricity to other public service companies for resale and distribution or that the acts of this defendant in entering into special contracts with other public service companies for the sale of electricity to them in the several instances referred to has to any extent beyond the particular terms and conditions of such special contracts constituted a waiver of its primary right of independence or imposed upon it or its property any duty to continue to sell electricity to such other public service companies after the expiration of its several contracts with them, and this defendant expressly pleads the contracts between it and the predecessors of the plaintiff, Public Service Company hereinbefore referred to as stopping said plaintiff from claiming that the defendant is under the public duty of selling it electricity.

That answering paragraph twenty-nine of the complaint, this defendant says that it is untrue that either the City of Greensboro or the City of High Point relied upon this defendant in granting a franchise to the North Carolina Public Service Company or its predecessors in title; that the franchise in each of said cities was granted to the predecessor of the North Carolina Public Service Company long before this defendant was chartered and came into existence. That while as this defendant is informed and believes, the City of High Point has recently entered into a contract with the North Carolina Public Service Company for the wholesale purchase of power from said Public Service Company to be retailed and distributed by the city, this contract was made after the North Carolina Public Service Company had been notified in accordance with this defendant's letters of January 8th, 1920, copies of which are attached to the complaint, that this defendant would not after

January 1st, 1921, supply any electricity whatever to the North Carolina Public Service Company, and that it would be necessary for said Public Service Company within the period of twelve months stated in said letters, to equip itself to supply the needs and requirements of its own customers and of its business. This defendant further alleges that the contracts hereinbefore referred to entered into between it and the predecessors of the North Carolina Public Service Company, in Greensboro and High Point, each expressly provided that all contracts made by said respective purchasers of such electricity for the retailing thereof, should be subject to said contract with this defendant and that the liability of this defendant for any purpose should not be construed to extend to any other person or corporation than its vendee, which provisions of said respective contracts are hereinbefore quoted in answer to paragraphs eleven and twelve of the plaintiff's complaint. That except as herein expressly admitted, the allegations of paragraph twenty-nine of the complaint are untrue and denied.

XXX.

56 That as this defendant is advised and believes, the allegations of paragraph thirty of the complaint are irrelevant and immaterial in that they are allegations of alleged conclusions of law and this defendant expressly reserves the right to move that the allegations of said paragraph of the complaint be stricken out. That without waiving such motion, this defendant says that it has no knowledge or information as to the advice which the plaintiffs may have received in respect to the subjects referred to in said paragraph of the complaint, but as this defendant is advised and believes, said advice if given to the plaintiffs was, with due deference to the giver thereof erroneous, except in so far as it is alleged that the plaintiffs have been advised that this defendant will not be permitted so substitute its will for the will of the citizens of Greensboro and High Point, or to dictate to said citizens to whom they shall grant franchise, in which latter advice this defendant concurs, and alleges that it has of course never undertaken to substitute its will for the will of the citizens of either of said cities, nor to dictate to either, to whom they should grant franchises. That this defendant has taken the position and still holds thereto, that if *the* either of said cities and the citizens thereof desire service from it, it is entitled to render such service directly and not through the medium of the North Carolina Public Service Company. That except as herein expressly admitted, the allegations of paragraph thirty of the complaint are untrue and denied.

XXXI.

That answering paragraph thirty-one of the complaint, this defendant admits that it has notified the North Carolina Public Service Co., that it will cut off and discontinue the sale of electricity to it after January 1, 1921, and that it has notified the City of Greens-

boro to the same effect. That as to the remaining allegations of said paragraph of the complaint, this defendant has no knowledge or information sufficient to form a belief as to the truth thereof and leaves the plaintiffs to their proof.

XXXII.

57 That answering paragraph thirty-two of the complaint, as this defendant is advised and believes, the allegations of said paragraph of the complaint are irrelevant and immaterial, in that they are statements of alleged conclusions of law and this defendant expressly reserves the right to move that the allegations of said paragraph of the complaint be stricken out. That without waiving such motion, this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph of the complaint and therefore denies the same, leaving the plaintiffs to their proof, except in so far as it is alleged that some years ago when requested by the Corporation Commission of the State of North Carolina to file a schedule of its rates, it in filing the schedule made the statement quoted in said paragraph of the complaint. That this statement was made for the reason that this defendant was at the time advised that since its electricity was transmitted and transported in interstate commerce, the North Carolina Corporation Commission had no jurisdiction to fix its rates and this defendant deemed it proper to call this matter to the attention of the Commission, recognizing of course that neither its advice nor its views in respect to this question of law were to any extent binding upon the Commission or anyone else.

XXXIII.

That answering paragraph thirty-three of the complaint it is untrue and denied that the plaintiffs or either of them are wholly at the mercy of the defendant in respect to the supply of electricity required by them or either of them or in any other respect. It is untrue and denied that the defendant has or enjoys a monopoly of hydro-electric power sites or hydro-electric power, accessible or available to the Cities of Greensboro and High Point, or that it operates all developed hydro-electric plants accessible or available to either of said cities. That as to the remaining allegations of said paragraph of the complaint this defendant has no knowledge or information sufficient to form a belief as to the truth thereof, and the same are therefore denied, leaving plaintiffs to their proof. In this connection the defendant expressly alleges that if the North Carolina Public Service Company had acted with due diligence upon receipt of this
58 defendant's letters of January 8th, 1920, attached to the complaint, and had shown a proper recognition of its obligations to the Cities of Greensboro and High Point and the citizens and inhabitants of said cities, it could easily have put itself in a position to fully and adequately serve said cities, their citizens and inhabitants by January 1st, 1921.

XXXIV.

That answering paragraph thirty-four of the complaint, as this defendant is informed and believes, the allegations of said paragraph of the complaint are untrue and the same are therefore denied. This defendant further alleges in connection with said paragraph of the complaint that it is unwilling to enter into any contract of any nature whatsoever for the sale of electricity to the North Carolina Public Service Company, and as it is advised and believes cannot be required or compelled to do so.

For a first further answer ' efense to the alleged cause of action of the plaintiffs, this defendan. lleges:

I.

That the plaintiff, North Carolina Public Service Company, is a public service corporation duly created, and organized by the State of North Carolina, and that its charter is contained in Chapter 24, of the Private Laws of North Carolina of 1909, which charter is hereby expressly pleaded. That under its charter said North Carolina Public Service Company is authorized and empowered to develop, build, construct, lease, rent, operate and equip water powers in this State, or elsewhere, and to distribute, sell or otherwise dispose of electric currents so generated by such water powers, and is further authorized and empowered to manufacture, generate, distribute and sell electricity and electric current for public and private use, for its own use and for distribution and sale to all persons, firms and corporations.

II.

59 That the said North Carolina Public Service Company, as such public service corporation, is engaged in the sale and distribution of electricity and electric currents and power in competition with this defendant and desires the electricity, electric currents and power which it is seeking by this action to require this defendant to continue to sell and deliver to it for the purpose of selling and distributing the same in competition with this defendant to the injury and detriment of this defendant and to its property and business.

III.

That this defendant generates and acquires the electricity, the electric currents and power generated and acquired by it for the purpose of selling and distributing the same to the users and consumers thereof, in order that it may make a profit upon the sale and distribution of said electricity, electric currents and power; that if it be required and compelled to continue to sell and deliver electricity, electric currents and power to the plaintiff, North Carolina Public Service Company, said North Carolina Public Service Company will resell and distribute said electricity, electric currents and

power to the users and consumers thereof, in competition with this defendant and will deprive this defendant of the profit incident to the sale and distribution of such electricity, electric currents and power, and will seriously injure and impair the property and business of this defendant and deprive it of the rights, privileges and franchises, which it has under the law, and is legally entitled to exercise and enjoy to wit: the right, privilege and franchise to sell and distribute to the users and consumers thereof, the electricity, electric currents and power generated, or otherwise acquired by it, and to make and realize therefrom such reasonable profit as there may be in the sale and distribution of such electricity, electric currents and power.

For a second further answer and defense to the alleged cause of action of the plaintiffs, this defendant alleges:

I.

60 That this defendant is duly authorized and empowered under its articles of incorporation and under and by virtue of the laws of the State of North Carolina, to sell and distribute electric power and current, directly to the users and consumers thereof, and to charge and collect from such users and consumers of said electric power, and current a fair and reasonable price for the sale and distribution thereof.

II.

That this defendant is now and was at and before the institution of this action and ever since has been ready and willing to sell and distribute to the City of Greensboro and to the City of High Point and to the citizens and inhabitants of each of said Cities, and to the consumers of power and current in each, electric power and current and to fully and adequately serve the needs and requirements of each of said cities, and of the citizens and inhabitants of each and of the consumers of power in each, to the limit of its ability, at fair and reasonable rates, and under just rules and regulations, which said rates, rules and regulations shall be the same under which this defendant is now selling and delivering electric power and current to others similarly situated, or as fixed by the Corporation Commission of the State of North Carolina, should application be made to said Corporation Commission to fix rates, rules and regulations, applicable to such service, provided of course, said respective cities grant to this defendant the necessary franchises and privileges to sell and distribute electric power and current to said respective cities and their citizens and inhabitants, and the consumers of power therein.

III.

That if said cities of High Point and Greensboro, either or both of them will grant to this defendant the necessary privileges and fran-

chises to enable this defendant to sell and distribute electric power and current for lighting, heating and power purposes in said cities, or either of them, this defendant will forthwith and without undue delay, proceed to make ready and equip itself, and will equip itself and adequately serve said cities and their citizens and inhabitants and consumers of electric power and current with such electric power and current for lighting, heating and power purposes, at fair and reasonable rates and under just rules and regulations.

IV.

That this defendant expressly pleads that, as it is advised and believes, it cannot be legally required of it, standing ready as it does, to directly and adequately serve the needs and requirements of the Cities of Greensboro and High Point, and their citizens and inhabitants and the consumers of electricity in said cities, to sell and deliver electric power and current to the North Carolina Public Service Company, to be resold and distributed by said North Carolina Public Service Company in said cities to them, their citizens and inhabitants, and the consumers of electricity therein and as this defendant is advised and believes, this action should stand dismissed.

For a third further answer and defense to the alleged cause of action of the plaintiffs, this defendant alleges:

I.

That the defendant specially pleads and relies upon the rights, privileges and immunities guaranteed and secured to it under and by virtue of the Commerce Clause, i. e. Article 1, Section 8, Clause 2 of the Constitution of the United States, and avers that should this Court make and enforce any order, judgment or decree herein, requiring this defendant to sell and deliver electric power and current to the plaintiffs, it will interfere with and directly burden interstate commerce, contrary to the provisions aforesaid of the Constitution of the United States, and will deprive this defendant of the rights, privileges and immunities guaranteed and secured to it by said Commerce Clause of the Constitution of the United States in the following respects and upon the following grounds, to wit:

(a) That the defendant's distributing system, consisting of poles, towers, wires, transforming stations and other electrical apparatus and appliances for the distribution and delivery of electric power and current, is located in both the States of North Carolina and South Carolina, extending throughout a large part of said States; that said electric power and current sold and distributed by the defendant over and by means of said distribution system is generated and manufactured through *sight* hydro-electric plants and four steam plants, which are designated and used as auxiliaries to said hydro-electric plants in cases of the partial or total incapacity of said hydro-electric plants due to low water or other emergencies, which said hydro-electric plants and auxiliary

steam plants are either owned by this defendant or by other Companies from whom it purchases power and current; that six of said hydro-electric plants and one of said steam plants are located and operated in the State of South Carolina, and the remaining two hydro-electric plants and three steam plants are located and operated in the State of North Carolina; that said hydro-electric plants are all, except one, located on the Catawba River or its tributaries which flow through the States of No. Carolina and South Carolina, and each of said plants is so operated with reference and in relation to the others as not to interfere with but to promote their efficiency; that in addition to the power acquired by it from the above mentioned plants, this defendant has in the past, from — to time, purchased electric power and current from other companies at such times as such other companies had a surplus of power and current over and above their own requirements, but the amount so purchased has constituted a small proportion of the total amount of power distributed by this defendant; that approximately eighty per cent of the total amount of power and current acquired by this defendant from all sources and distributed by it to its customers has been, and is being, generated in the State of South Carolina, and delivered to this defendant in said State, and the remaining current or power acquired and distributed by this defendant over its distribution system, i. e. 20% of the total, has been acquired in the State of North Carolina, either by being generated or purchased and delivered in said State, except a comparatively small amount which

this defendant has from time to time purchased and received
63 in the State of Georgia, and transmitted into the States of

North and South Carolina; that considerably more than one-half of the total amount of power acquired by this defendant and distributed and delivered to its customers has been distributed and delivered to customers in the State of North Carolina with a result that approximately three-fourths of the power sold and delivered in the State of North Carolina has been transmitted and delivered into said State from the State of South Carolina; that the balance of the defendant's electric power and current other than that sold and delivered in the State of North Carolina is sold and delivered to customers and consumers in the State of South Carolina; that all of the power and current generated by the defendant or otherwise acquired by it is, and of necessity must be, commingled upon its distribution system for distribution and delivery to its customers and consumers in both the States of North Carolina and South Carolina, so that it is impossible to distinguish the power and current generated or acquired and distributed in the State of South Carolina from that generated or acquired and distributed in the State of North Carolina and so that it is, and from the nature and character of the business must necessarily be, impossible for the State of North Carolina to in any way regulate or control the sale and delivery of electric power and current generated or otherwise acquired by defendant in the State of North Carolina without at the same time regulating and controlling the sale and delivery of electric power and current generated in the State of South Carolina and there acquired by it and

transmitted and sold in interstate commerce from said State into the State of North Carolina, as well as regulating, controlling and restricting the sale and distribution of such power and current to customers and consumers in the State of South Carolina, both as respects that generated or acquired in said State and that generated or acquired in the State of North Carolina and transmitted and delivered in interstate commerce from said State to customers and consumers in the State of South Carolina; that the electric power and current generated or acquired by the defendant in the State of South Carolina and transmitted and delivered from said State to customers and consumers in the State of North Carolina, as well as that generated or acquired by the defendant in the State of North

64 Carolina and transmitted and delivered from said State to customers and consumers in the State of South Carolina, is so transmitted and delivered pursuant to the terms of contracts made with said customers and consumers before said power is generated, transmitted or brought from the one State into the other, and the transmission and flow of said electric power and current from the one State to the other and between said States is direct from the generating sources to the point where it is used by the consumer without either interruption or storage in either of said States.

(b) That at and before, and ever since, the institution of this action, it has required approximately three times as much power as the defendant, or the generating companies from whom it purchases power have been or are capable of generating or acquiring by purchase or otherwise in the State of North Carolina to supply the demands and requirements of its regular customers in said State to whom it was then, and at all times since and still is, obligated by contract to furnish and deliver electric power and current, and accordingly it has been, and still is, necessary for the defendant to generate or purchase in the State of South Carolina and transmit from said State and deliver to its customers and consumers in the State of North Carolina, approximately three-fourths of the power and current that it has been, and is now selling and delivering in this State and should this Court, by any judgment or decree made and enforced herein, require or compel this defendant to sell and deliver power and current to the plaintiffs, said power and current must necessarily be generated or purchased from generating companies in the State of South Carolina and transmitted by this defendant from the State of South Carolina and delivered to the plaintiffs in this State.

For a fourth further answer and defense to the alleged cause of action of the plaintiffs, this defendant alleges:

I.

65 That this defendant specially pleads and claims that should this Court make any order, judgment or decree herein requiring or compelling it to furnish and deliver electric power or current to the plaintiffs, or either of them, it would deprive the defendant of its property and of its liberty to contract without

due process of law and contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States in the following respects and upon the following grounds and this defendant specially pleads and claims the rights, privileges and immunities guaranteed and secured to it by said Fifth and Fourteenth Amendments to the Constitution of the United States, to-wit:

(a) That this defendant has never devoted nor dedicated its property to the use or business of selling electric power or current to other public service companies for resale and distribution to their customers and consumers nor for use in the prosecution of their business as such public service companies nor has it ever indicated or proposed a willingness to sell and deliver such electric power and current to other public service companies, except that in a few instances it has made special contracts with such companies for the sale of electric power and current to them, which said contracts contain special and particular limitations and provisions as to the terms and conditions of such sales and which said special contracts were made under and by virtue of the particular charter right and privilege conferred upon this defendant in its Articles of Incorporation hereinbefore set forth, giving to it the permission to make such special contracts with other public service companies for the sale to them of electric power and current upon such terms and conditions as it might agree upon with such other public service companies. That as hereinbefore alleged the plaintiff North Carolina Public Service Company is a public service corporation and desires the electric current and power which it is seeking in this action to require the defendant to sell and deliver to it for resale and distribution to its own customers and consumers, except such part of said electric power and current as said North Carolina Public Service Company desires to use as motive power for propelling its street cars, and, as to such part of said electric power, said North Carolina

Public Service Company is authorized and empowered under 66 its charter to generate the same, either by steam or water.

That should this defendant be required or compelled to sell and deliver electric power and current to the Plaintiff North Carolina Public Service Company for resale and distribution to its customers and consumers and for use in the prosecution of its business as a public service company, this defendant will be deprived of its property and denied the right and liberty to contract for the sale and delivery of its property without due process of law and contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

(b) That this defendant, in addition to being authorized and empowered to manufacture and generate electricity is authorized and empowered and has the right and franchise to sell and distribute same and, should this defendant be required and compelled to sell and deliver to the plaintiff North Carolina Public Service Company for resale and distribution by it to its customers all or any part of the power and current manufactured, generated or otherwise acquired by this defendant, this defendant will be deprived of its

right and franchise to sell and distribute its electric power and current and denied the profit incident to such sale and distribution with the result that its property and franchise will be taken without due process of law contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

(c) That this defendant has invested many thousands of dollars in its distribution system in order to be able to sell and distribute the electric power and current generated or otherwise acquired by it and should this Court determine and hold that the plaintiff North Carolina Public Service Company can require and compel this defendant to sell and deliver to it the electric power and current generated or acquired by this defendant, thereby denying to this defendant the right and privilege to sell and distribute through its own distribution system the power and current manufactured and generated or otherwise acquired by it, this defendant's distribution system will be greatly impaired in value with the result that this defendant will be deprived of its property without due process
67 of law and contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

(d) That as hereinbefore alleged, this defendant is now, and has for some time prior to the institution of this action, been selling and delivering to customers and consumers in this State more than three times as much power and current as it and the generating companies from whom it purchases power have been or are capable of generating or otherwise acquiring in this State and it is, and has been, necessary for this defendant to purchase power from such generating companies in the State of South Carolina and transmit same from said State and deliver it in this State and, should this defendant be required to sell and deliver power and current to the plaintiffs, it will be necessary for it to purchase it from generating companies in the State of South Carolina and transmit it into this State, and this defendant alleges that, as it is advised and believes, this Court has no power or jurisdiction to require it either to generate power in the State of South Carolina or to purchase same from generating companies in said State and transmit it into this State with the result that any order, judgment or decree made and enforced in this action, requiring and compelling this defendant to sell and deliver electric power and current to the plaintiffs will be without due process of law and contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

For a fifth further answer and defense to the alleged cause of action of the plaintiffs, this defendant alleges:

I.

That the defendant and its allied companies are public service corporations doing business and selling and distributing electric power and current to the citizens and inhabitants and users of such electric power and current in the State of South Carolina; that as hereinbefore alleged this defendant is now and was at the time of

the institution of this suit, and has been for some time past, 68 selling and distributing in the State of North Carolina more than three times as much electric power and current as it and its allied companies have been able to generate or otherwise acquire in the State of North Carolina, and that this defendant is now and was, and has been during such time, transmitting from the State of South Carolina into the State of North Carolina for sale and distribution in the State of North Carolina more than two-thirds of the electric power and current generated or otherwise acquired by it and its allied companies in said State of South Carolina; that, as this defendant is advised and believes, this Court cannot make or enforce any order, judgment, or decree in this action, requiring this defendant to sell and deliver electric power and current to the plaintiffs, without interfering with the relations between this defendant and its allied companies and its and their customers and consumers in the State of South Carolina, and, as this defendant is further advised and believes, this Court has no jurisdiction or power either to require it to transport power and current from the State of South Carolina into this State or to make or enforce any order, judgment or decree which will, as alleged, interfere with the relations between this defendant and its allied companies and their customers and consumers in the State of South Carolina on account whereof this defendant alleges that any order judgment or decree made or enforced herein, requiring or compelling this defendant to sell and deliver electric power and current to the plaintiffs, will be without due process of law and contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and will also directly interfere with and burden interstate commerce in violation of the Commerce Clause of the Constitution of the United States, to-wit: Article 1, Section 8, Clause 2 of the Constitution of the United States, and any such order, judgment or decree will deny to this defendant the rights, privileges and immunities secured to it by the Constitution of the United States, both under the Fifth and Fourteenth Amendments and the Commerce Clause thereof, and this defendant specially pleads, sets up and claims said rights, privileges and immunities, and each of them, as full protection against such other order, judgment or decree being made or enforced in this action.

69 For a sixth further answer and defense to the alleged cause of action of the plaintiffs, and by way of a counter-claim by the defendant Southern Power Company against the plaintiffs above named, the defendant, Southern Power Company, avers:

I.

That this counter-claim is set up and pleaded by the defendant against the plaintiffs to restrain the plaintiffs from proceeding further with their above entitled suit against the defendant in the Superior Court of Guilford County, North Carolina, or in any Court other than this Court, in derogation of the jurisdiction of this

Court over said suit, which this Court now has and has had since the due removal of said suit from said Superior Court of Guilford County, North Carolina, to this Court by the Southern Power Company under the Acts of Congress, relating to the removal of actions from the Courts of the several states to the United States District Court as well as to restrain the plaintiffs from unlawfully imposing upon the defendant the cost and expense of trying said suit in said Superior Court of Guilford County, North Carolina or in any Court other than this Court, and to restrain them from unlawfully taking the property of this defendant and from unlawfully interfering with and impairing its business, which said counter-claim is a suit in Equity between citizens of different states, as herein elsewhere appears, and is set up and pleaded by the defendant against the plaintiffs in the District and State of which all of the plaintiffs are residents and inhabitants, and that the matter in controversy in this counter-claim exceeds, exclusive of interest and costs, the value of Three Thousand Dollars (\$3,000.00).

II.

That as will appear by the record herein, the plaintiffs brought their suit against the defendant to which this counter-claim is set up in the Superior Court of Guilford County, North Carolina by the issuance of summons from said Court, dated September 2, 1920, which summons together with the complaint of the plaintiffs accompanying it, was served upon the defendant on the 70 3rd day of September, 1920; that thereafter and before, the defendant was required by the laws of the State of North Carolina or by the rules of the said Superior Court of said State, in which said suit was brought, to answer or plead to said complaint of the plaintiffs, the defendant duly made, filed and presented in said Superior Court of Guilford County, North Carolina, its petition duly verified, and its bond duly conditioned with good and sufficient surety for the removal of said suit from said Superior Court of Guilford County, North Carolina, to the United States District Court for the Western District of North Carolina, and duly gave and served upon the plaintiffs written notice of said petition and bond prior to the filing and presenting thereof, and in all respects and particulars duly complied with the conditions and requirements of the Statutes of the United States in such cases made and provided for the removal of actions from the Courts of the several States to the United States District Court, to-wit: Sections 28 and 29 of the Judicial Code of the United States of 1911, and thereafter duly presented its petition and bond for the removal of said suit to the United States District Court for the Western District of North Carolina to the Judge presiding over said Superior Court of Guilford County, North Carolina, and thereafter duly caused a true and correct certified copy of the record of said suit to be duly entered and docketed in this Court, which said certified copy of said record

was duly entered and docketed herein on the 15th day of September, A. D. 1920.

III.

That this defendant alleges that said Superior Court of Guilford County, North Carolina, has had no jurisdiction of it nor of said suit by the plaintiffs against it, nor has it had, since the filing of said petition and bond to remove said suit to this Court, and further alleges that this Court alone has and has had since the filing of said petition and bond, jurisdiction of it and of said suit, and this defendant expressly sets up and pleads its rights, privileges and immunities under the Constitution of the United States and Statutes of the Congress of the United States, to-wit: under Article 71 3, Section 2, of the Constitution of the United States and Chapter 3 of the Judicial Code of the United States of 1911 that is to say, this defendant expressly sets up and pleads its right and privilege to have said suit tried in this Court and its immunity from being further proceeded against in said suit by the plaintiffs in the Superior Court of Guilford County, North Carolina, or in any other Court than this Court. And this defendant further avers that if the plaintiffs are permitted to further proceed against it in said suit in the Superior Court of Guilford County, North Carolina, it will cause this defendant to incur great cost and expense in the trial and defense of said suit and will unlawfully deprive this defendant of its rights, privileges and immunities under the constitution of the United States and the Statutes of the Congress of the United States above named, and will constitute an unlawful taking of this defendant's property and seriously interfere with its business.

IV.

That notwithstanding the removal of said suit from said Superior Court of Guilford County, North Carolina, to this Court, as hereinbefore alleged, the plaintiffs have threatened, evinced the action to proceed with the prosecution of said suit against this defendant in said Superior Court of Guilford County, North Carolina, and to attempt thereby to take the property of this defendant and to seriously interfere with its business, as a public service corporation in the generation, sale and distribution of electricity to the consuming public and to embarrass it in the due and proper prosecution of its said business.

V.

That this defendant has no remedy against the plaintiffs according to the course and practice of the common law, and can have no adequate relief herein, save by this Honorable Court, wherefore, this defendant prays this Honorable Court that a writ or writs of injunction be issued, preliminary until the hearing of this cause and permanent thereafter, enjoining said North Carolina Public Service

72 Company, City of Greensboro and City of High Point, their officers, attorneys, agents, employees and confederates, and each of them, from directly or indirectly proceeding further with the prose- of Greensboro to and the City of High Point, but in the Superior Court of Guilford County, North Carolina, or in any other Court than this Court and that all other proper relief in the premises may be herein granted to it.

For a seventh further answer and defense to the alleged cause of action of the plaintiff North Carolina Public Service Company and by way of a counter-claim by the defendant, Southern Power Company, against the plaintiff, North Carolina Public Service Company, the defendant Southern Power Company avers:

I.

That this counter-claim is set up and pleaded by the defendant, Southern Power Company, against the plaintiff, North Carolina Public Service Company, to restrain it from instituting vexatious suits and actions against this defendant, as well as to restrain said North Carolina Public Service Company from making, publishing and circulating against this defendant, unfounded and untrue statements, charges and rumors, calculated and intended to injure and embarrass this defendant in the conduct and prosecution of its business, and also to restrain said North Carolina Public Service Company from otherwise interfering with and injuring or attempting to interfere with and injure this defendant in the conduct and prosecution of its business and in its relations with its existing and prospective customers, which said counter-claim is a suit in equity between citizens of different states as herein elsewhere appears, and is set up and pleaded against said plaintiff, North Carolina Public Service Company in the District and State of which said plaintiff is a resident and inhabitant, and that the matter in controversy in this counter-claim exceeds, exclusive of interest and costs, the value of Three Thousand Dollars (\$3,000.00).

73

II.

That this defendant is a corporation duly organized, created and existing under the laws of the State of New Jersey and is, and has for some years past been duly authorized and licensed to conduct and carry on its business in the States of North and South Carolina, which said business principally consists of the generation, sale and distribution of electric currents and power to the consuming public. That this defendant, in addition to the power given to it by its charter to manufacture, generate and distribute to the consuming public electricity for lighting, heating and power, proposes, is authorized and empowered by its charter as follows, to-wit: "To dispose of to such person or persons, corporation or corporations, and for such price or prices and on such terms and conditions as to the corporation (this defendant) may seem proper, electrical and other power for the generation, distribution and supply of electricity for light, heat and

power, and for any other uses and purposes to which same are adapted."

III.

That acting under the authority contained in its charter as aforesaid, this defendant on or about the 21st day of November, 1908, made and entered into a written contract with the High Point Electric Company for the sale of electricity to said Company, in amounts not to exceed at any one time twelve hundred (1,200) kilowatts for the uses and purposes and upon the express terms and conditions stated in said contract, the term of which was expressly limited to the period of ten years from the date of the commencement of service thereunder, and to which said contract this defendant craves leave to refer as often as may be desired. That also acting under the authority contained in its charter, as aforesaid, this defendant on or about the 23rd day of December, A. D. 1908, made and entered into a written contract with the Greensboro Electric Company for the sale of electricity to said Company for the uses and purposes and upon the express terms and conditions stated in said contract, in amounts not

74 to exceed at any one time three thousand (3,000) kilowatts, the term of which said contract was expressly limited to the period of ten years from the date of the commencement of service thereunder, and to which said contract this defendant craves leave to refer as often as may be desired. That said High Point Electric Power Company and said Greensboro Electric Company were each public service corporations, and each purchased said electricity under said contracts from this defendant for the purpose of retailing and distributing same to their respective customers. That each of said contracts expressly provided as follows: "All contracts made by said consumer (in each case the purchasing company) for such retailing of said electric power shall be subject to this contract and the liability of the Power Company for any purpose shall not be construed to extend to any other person or corporation than the said consumer."

IV.

That subsequently to the making of said contracts referred to in the preceding paragraph, the plaintiff, North Carolina Public Service Company, in some manner to this defendant unknown acquired and took over from said High Point Electric Power Company and said Greensboro Electric Company all the property, franchises, rights and contracts of each of said companies and succeeded to the rights and obligations of each of said companies under their respective contracts with this defendant, and thereafter this defendant duly performed each of said contracts to the benefit and for the advantage of said North Carolina Public Service Company.

V.

That notwithstanding the fact that the term of each of said contracts has expired and that this defendant has duly performed each

of them, and has discharged every obligation thereunder, the plaintiff, North Carolina Public Service Company, has for some time past, without any foundations whatsoever for its claims and contentions, claimed and contended that this defendant is under obligations to continue to sell to it electricity for the purpose of retailing same to its customers, and, as this defendant is informed and believes, has threatened to institute and bring against this defendant numerous suits and actions for the purpose of vexing and embarrassing this defendant in the conduct and prosecution of its business, with the intention to thereby coerce and force this defendant to sell it electricity in order to rid itself of such vexatious and embarrassing suits and actions.

VI.

That as this defendant is further informed and believes, said North Carolina Public Service Company has for some time past been systematically and designedly making, publishing and circulating untrue and unfounded statements, charges and rumors against this defendant, to-wit: Said Public Service Company has charged against this defendant and circulated the rumor that it is unjust and oppressive in the conduct and prosecution of its business and its dealings with its customers; that in the sale of electricity to its customers it unjustly and unlawfully discriminates in the rates and conditions under which said electricity is sold in favor of those customers in whose business enterprises the officers and directors of this defendant are interested; that this defendant in the conduct of its business refuses to recognize and be governed by the law regulating or controlling the activities of public service companies; that each and all of said charges, statements and rumors are untrue and unfounded, and they have been and are calculated to seriously interfere with and embarrass this defendant in the conduct and prosecution of its business and in its dealings with its customers, and to deter those who would otherwise deal with this defendant and purchase electricity from it from doing so.

VII.

That as this defendant is informed and believes, said North Carolina Public Service Company has pursued the methods and done the things hereinbefore set forth with the purpose and intent of creating a feeling and prejudice against this defendant, particularly in the territory in which said North Carolina Public Service Company is engaged in business, in order thereby to exclude this defendant from selling and distributing electricity in said territory in competition with said Public Service Company so that the Public Service Company may acquire and retain a monopoly in the sale and distribution of electricity in said territory, particularly a monopoly of the sale and distribution of electricity for domestic lighting, heating and power purposes in the cities and towns in said territory. That the plaintiff North Carolina Public Service Company, holds a franchise for the

sale and distribution of electricity in the City of Greensboro and under said franchise has for some years past been engaged in the sale and distribution of electricity in said city to the citizens and inhabitants thereof for the lighting, heating and power purposes, and it has also for some years past been selling electricity to the City of High Point to be resold and distributed by said city to its citizens and inhabitants. That although said North Carolina Public Service Company generates little or none of the electricity which it sells and distributes in the City of Greensboro and to the City of High Point, but in the sale thereof acts simply as a middle man, thereby adding to the cost and expense of said electricity to the ultimate consumers thereof, yet said North Carolina Public Service Company has sought and is seeking to retain to itself a monopoly in the sale and distribution of electricity in said cities and has particularly sought and is still seeking by means of making and publishing and circulating untrue and unfounded statements, charges and rumors against this defendant, as hereinbefore alleged, to exclude this defendant from competition with it in said cities. That this defendant, as a public service corporation duly licensed to carry on its business of selling and distributing electricity in the State of North Carolina, is entitled to compete with the plaintiff Public Service Company in the business of selling and distributing electricity without being hindered, embarrassed and injured by the unfair and unlawful methods, practices and acts of the plaintiff Public Service Company as hereinbefore alleged.

VIII.

77 That in April, 1920, this defendant duly applied to the City of Greensboro for a franchise to engage in the business of selling and distributing electricity in said city to the citizens and inhabitants thereof for lighting, heating and power purposes and upon such terms and conditions as said City of Greensboro might see fit to incorporate in said franchise and at rates to be fixed by the Corporation Commission of the State of North Carolina, which under the laws of said State alone has jurisdiction to fix the rates of this defendant. That acting upon said petition, the commissioners of said cities did submit to the voters thereof a proposed franchise to be granted this defendant, the terms and conditions whereof were far more exacting than those contained in the franchise granted by said City of Greensboro to the plaintiff, North Carolina Public Service Company, and under which it is conducting its business in said City of Greensboro, which will more clearly appear by reference to said franchise which the commissioners propose to grant to this defendant and the franchise of the Public Service Company, to both of which this defendant craves leave to refer as often as may be desired. That the plaintiff, North Carolina Public Service Company, not only to dissuade and prevent said commissioners from submitting said franchise to the voters of said City of Greensboro in order that said voters might not be given an opportunity to express their will upon the question of granting a franchise to this defendant, but after said commissioners determined to submit said

franchise to the voters of said city, said North Carolina Public Service Company, in order to induce the voters of said City of Greensboro to vote against the granting of said franchise, published and circulated against this defendant untrue and unfounded charges, statements and rumors, among other things the North Carolina Public Service Company charged and published against this defendant that it conducted its business in open and flagrant disregard and violation of the law, that this defendant denied and would continue to deny the power and authority of the Corporation Commission of North Carolina to fix its rates for the sale of electricity in said City of Greensboro, and that this defendant arrogated to itself the right to fix such rates as it saw fit to fix, and that this defendant would fix exorbitant, unreasonable and oppressive rates, and in the sale of electricity would discriminate among the users and consumers thereof. Said North Carolina Public Service Company further charged and circulated the rumor that this defendant was not applying for said franchise in good faith, but for the purpose of bankrupting said Public Service Company and subsequently acquiring its property and business in the City of Greensboro, and that if said franchise were granted this defendant it would use the same, not for the benefit and advantage of the citizens and inhabitants of Greensboro, but as a means of acquiring the property and business of the North Carolina Public Service Company at a sacrifice price. That each and all of said statements, charges and rumors were untrue and unfounded and were made, published and circulated by said North Carolina Public Service Company solely for the purpose of preventing, and as this defendant is informed and believes did prevent the granting of said franchise to this defendant, in order thereby to exclude this defendant from competition with it and to retain to itself a monopoly in the sale and distribution of electricity in said City of Greensboro.

IX.

That this defendant has many thousands of dollars invested in its business of generating and distributing electricity in the Piedmont section of North and South Carolina and has in the past been diligently engaged in the prosecution of said business, and believes that its efforts have been of incalculable benefit and advantage to the people of said Piedmont section. That this defendant has entertained the hope and purpose that it might enlarge and further extend its business and continue to assist in the growth and upbuilding of said Piedmont section, but the acts and conduct of the plaintiff, North Carolina Public Service Company, have been and still continue to be a serious menace and hinderance to it in accomplishment of this purpose. And this defendant avers that it is not only a matter of first importance to it, but of great importance as well to the people and industries of said Piedmont section, that the claims and the contentions of the North Carolina Public Service Company against this defendant be judicially determined, and if and to the extent that said claims and contentions are untrue and unfounded, said North Carolina Public Service Company be

enjoined from continuing to make and assert said claims and contentions and from otherwise embarrassing and vexing this defendant in any of the ways hereinbefore set forth, and particularly that it be enjoined from making, publishing and circulating against this defendant untrue and unfounded charges, statements and rumors for the purpose of creating against the defendant unjust prejudice and feeling, in order thereby to injure this defendant in the conduct of its business and to unfairly deny to this defendant the right to compete with said plaintiff North Carolina Public Service Company in the sale and distribution of electricity.

X.

That this defendant is without remedy according to the course and practice of the common law and can have no adequate relief save by this honorable Court.

Wherefore, the defendant, Southern Power Company, having fully answered the complaint of the plaintiffs, prays as follows:

(1) That the bill of complaint of the plaintiffs against it be dismissed at the cost and expense of the plaintiffs.

(2) That a writ or writ of injunction be issued preliminary until the hearing of this cause, and permanent thereafter, enjoining the plaintiffs, their officers, attorneys, agents, employees and confederates, and each of them, from directly or indirectly proceeding further with the prosecution of their suit against the defendant in the Superior Court of Guilford County, North Carolina, or in any other court than this Court.

(3) That a writ or writ of injunction be issued preliminary until the hearing of this cause, and permanent thereafter, enjoining the plaintiff, North Carolina Public Service Company, its officers, attorneys, agents, employees and confederates from instituting and prosecuting against this defendant vexatious suits and actions

80 connected with the subject matter of this litigation, and enjoining it and them from making, publishing and circulating against this defendant unfounded and untrue statements, charges and rumors calculated and intended to injure and embarrass this defendant in the conduct and prosecution of its business, and also enjoining it and them from interfering with or attempting to interfere with this defendant in its relations with its existing and prospective customers in the sale of electricity, and from using and employing against this defendant unfair and unjust means and methods of competition.

(4) That this defendant may have each other and further relief as the equity of the case may require. Cansler & Cansler, Broadhurst & Cox, W. P. Bynum, W. S. O'B. Robinson, Jr., Attorneys for Defendant.

STATE OF NORTH CAROLINA,
County of Mecklenburg:

E. C. Marshall, being first duly sworn, deposes and says that he is an officer of the Southern Power Company, the defendant named in the above entitled suit, to-wit, its asst. sec.; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to such matters he believes it to be true. E. C. Marshall.

Sworn to and subscribed before me this the 2nd day of October, A. D. 1920. D. C. Carmichael, Notary Public, Mecklenburg County, N. C. (Seal.) My com. expires Aug. 10, 1922.

81

Reply.

Filed Nov. 10, 1920.

[Title omitted.]

Now comes the plaintiffs, North Carolina Public Service Company, City of Greensboro and City of High Point, in the above entitled proceedings, and appearing under protest, would show to the Court that this is a proceeding for a writ of mandamus instituted in the State courts of North Carolina, under a statute of the State specially designating the procedure for the institution of such an application, which said procedure is distinct and unlike the procedure prescribed for any other character of action or proceeding in the courts of the State of North Carolina, and that the proceedings so constituted is not a suit of a civil nature at law or in equity which can be removed from the State to the Federal Court, and that this Court has no jurisdiction to entertain and proceed further with the same; and the plaintiffs would further show that it appears from the complaint and the answer herein filed, and the matters herein appearing, that this is an action for a writ of mandamus, and is not a suit of a civil nature at common law or in equity within the meaning of the Acts of Congress creating and defining the jurisdiction of the Circuit Court of the United States, and that this Court has no original jurisdiction to entertain such an action, and cannot acquire jurisdiction by removal; and plaintiffs would further show that this proceeding for mandamus seeks no money demand, and that the amount involved, exclusive of interest and cost, is not three thousand dollars; that for each of the reasons above assigned and causes presented plaintiffs insist that this action should be remanded to the State Court, where that

82

Court may continue to administer the rights of the parties, as it is now doing.

That these plaintiffs, expressly reserving unto themselves the right to continue this action in the State courts to final judgment, and denying the jurisdiction of this Court for the reasons above set forth, for reply to the counter-claim and set-off pleaded by the defendant in this Court say:

I.

That all matters and things set forth in defendant's answer and in its further defense, inconsistent with and contradictory of the matters and things alleged in the complaint, are untrue and denied.

II.

That replying to each of the allegations set forth by the defendant in its so-called sixth and seventh further answer and counter-claim as specifically as if herein severally mentioned, plaintiffs aver that each and every allegation therein contained inconsistent with the facts set forth in the complaint, except as hereinafter admitted, are untrue and denied.

III.

That plaintiffs expressly deny defendant's plea of immunity against the further prosecution of this action in the State Court by the plaintiffs, since defendant itself is now defending its rights in said action in the State Court and is availing itself of the laws of North Carolina and the jurisdiction of its courts to support its contentions and the property rights as asserted in this action, as will more fully appear from the following facts:

On Saturday, September 11th, the defendant filed with the Superior Court of Guilford County its petition and bond for removal. Upon the hearing of same the Court declined to grant the petition and entered an order accordingly. From this order the defendant appealed, and on the same day agreed upon a statement of the case on appeal. That in order for plaintiff to protect its right in the State Court and to avail itself of the benefits of the law of North Carolina, it entered into a stipulation with the plaintiff providing for the extension of time in which to file the answer in the event the Supreme Court upon its appeal should affirm the order of the Superior Court in declining to remove the cause. Said stipulation is in words and figures as follows:

83 "It is agreed by the parties to the above entitled action that the defendant's appeal to the Supreme Court of North Carolina from the order made herein by Judge Ray, dated September 11th, 1920, refusing to grant the defendant's petition for the removal of this case to the United States District Court for the Western District of North Carolina and to order the removal of the said case to the said United States District Court, may be docketed by either party to said appeal and heard at the Fall term, 1920, of the Supreme Court, and that pending said appeal the defendant shall not be required to answer, demur or otherwise plead to the complaint of the plaintiffs. After the determination of the said appeal by the Supreme Court, if said Court affirms said order, the defendant shall within fifteen (15) days answer, demur or otherwise plead to the complaint of the plaintiffs, unless its time is further extended by agreement or order of the

Court, and this agreement is made without prejudice in any other respect to any of the rights of the respective parties, and shall not be construed as an acknowledgment by the defendant of the jurisdiction of the State Court or as waiving any of its rights under its said petition and bond for removal. Brooks & Kelly, Attorneys for N. C. Pub. Serv. Co. Chas. A. Hines, Attorney for City of Greensboro. Dred Peacock, Attorney for City of High Point. W. P. Bynum, Cansler & Cansler, Broadhurst & Coxe, W. S. O'B. Robinson, Jr., Attorneys for Defendant Southern Power Company."

84 That thereafter, to-wit, on the 14th day of September, defendant filed a transcript of the record for removal in this Court; that notwithstanding the filing of said record, defendant thereafter perfected its case on appeal to the Supreme Court, filed briefs with the Court, and argued same, and the same is still pending before the said Supreme Court. Plaintiffs are advised, and so aver, that defendant's plea to the jurisdiction of the State Court can under the laws, procedure and practice of the United States Court be heard upon writ of error by the Supreme Court of the United States after final judgment in the State Court, and all of its rights, privileges and immunities thus protected and safeguarded, and that this Court will in no event exercise its equitable jurisdiction to restrain the plaintiffs from proceedings in the State Court while the defendant is actively engaged in maintaining its defenses in the State Court and relying upon the jurisdiction and administration of the laws of the State Court to protect its rights.

IV.

That the plaintiff, North Carolina Public Service Company, emphatically denies that it has been or is making, publishing and circulating against the defendant unfounded and untrue statements, charges and rumors calculated and intended to injure and embarrass this defendant in the conduct and prosecution of its business, or that it has at any time made any statement or charges against the defendant that were not true and warranted by the circumstances of the case.

V.

That plaintiffs aver that if there is any feeling existing in North Carolina against the defendant it is the direct result of its own declared purpose not to be regulated in its dealings with the public by the law fully constituted authorities of the State and its established practice of charging different rates to various customers for current sold under substantially the same conditions. That the plaintiffs have never demanded of the defendant any service or undertaken to impose upon it any obligation different from that imposed
85 and enjoined by the laws of the land and by the courts of North Carolina in cases heretofore determined by it between the North Carolina Public Service Company and the Southern Power Company. Special reference is hereby made to the opinions of the

Supreme Court of North Carolina in said cases, reported in 179 N. C., page 19 and page 331, et seq.

VI.

Plaintiffs aver that the so-called set-off and counterclaim pleaded by the defendant in this action are not germane or material to the issue involved in this case, and that the said pleas do not constitute under the rules and practices of this Court a set-off or counter-claim, and plaintiffs reserve the right to hereafter move the Court to strike out said so-called counter-claim and set-off.

Wherefore, plaintiffs having fully replied to the answer of the defendant, prays:

1st, that defendant's so-called further defense and set-off be stricken out; and,

2nd, that the cause be remanded to the State Court; and,

3rd, that the plaintiffs may have such other and further relief as in law and equity it may be justly entitled. Brooks & Kelly, Attorneys for North Carolina Public Service Co. Chas. A. Hines, Attorney for City of Greensboro. Dred Peacock, Attorney for City of High Point.

NORTH CAROLINA,
Guilford County:

R. J. Hole, first being duly sworn, deposes and says: That
86 he is vice-president and general manager of the plaintiff North Carolina Public Service Company; that he has read the foregoing reply and that same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those he believes it to be true. R. J. Hole.

Sworn to and subscribed before me this 10th day of November, 1920. John R. Atwell, Notary Public. (Seal.) My commission expires May 13, 1922.

Motion to Remand.

[Filed Dec. 22, 1920.]

[Title omitted.]

Now comes the plaintiffs, North Carolina Public Service Company, City of Greensboro and City of High Point, and renew their motion to remand the above entitled cause to the State Court, and in addition to the matters and things set out in their reply to the defendant's answer hereinbefore filed, they beg leave to set forth to the Court the following further matters and things not heretofore appearing of record in this Court:

I.

That upon defendant's appeal to the Supreme Court of North Carolina from the Superior Court's declining to remove the cause to this Court for lack of jurisdiction, the Supreme Court of the State of North Carolina, in a recent decision handed down in said case, holds that the State courts have jurisdiction of the action, that the action under the practice and procedure of the laws of North Carolina is an application for mandamus, that the Federal courts have no jurisdiction of such proceedings, and therefore the case is not removable; which said opinion we beg to call to the Court's attention.

II.

That after the rendition of the opinion of the Supreme Court, as above referred to, the defendant filed its answer in the Superior Court of Guilford County to said application for a writ of mandamus, and the Judge of said Court on the 14th day of December, 1920, awarded a final judgment in favor of the plaintiffs and against the defendant, granting a peremptory writ of mandamus, and then and there finally disposed of all matters involved in said litigation; that the defendant gave notice of an appeal from said judgment to the Supreme Court of North Carolina.

III.

That plaintiffs are advised that under the procedure of the Federal and State courts, if the Supreme Court of North Carolina is in error as to the question of jurisdiction, this error can be corrected by the defendant's carrying the case from the Supreme Court of North Carolina to the Supreme Court of the United States upon writ of error, thereby protecting and preserving any rights that it may have in the premises, and that defendant having elected and continued to prosecute its defense in the State Court, and the Supreme Court having affirmed the State Court's jurisdiction, that this Court under the established procedure and customs of the Court will not entertain jurisdiction of same. Brooks & Kelly, Attys. for North Carolina Pub. Serv. Co. Chas. A. Hines, Atty. for City of Greensboro. Dred Peacock, Atty. for City of High Point.

88

Transcript from Superior Court.*Affidavit of R. J. Hole.*

(Filed Jany. 10, 1921.)

NORTH CAROLINA,
Guilford County:

[Title omitted.]

R. J. Hole, being first duly sworn, says: That he is a resident of the State and County above named and that he is vice-president and general manager of the plaintiff North Carolina Public

Service Company and is authorized to make this affidavit; that the above entitled action is pending in the Superior Court of Guilford County and summons has been issued and has been served upon the defendant Southern Power Company; that the complaint in said action has been filed, and said complaint is hereby referred to and asked to be taken as a part of this affidavit as fully as if herein set out; that the affiant has cause to believe, and does believe, that the defendant Southern Power Company intends before a hearing of said action can be had in the Superior Court of Guilford County to cut off and discontinue furnishing electric current to the plaintiff; that it has denied that it owes any duty to the plaintiff to furnish it electric current and threatens to discontinue furnishing said current, and may do so sooner than January 1st, 1921, the time fixed in the exhibits attached to the complaint; that since the institution of this action the officers and servants of the defendant have become very hostile towards the plaintiffs in this action, and plaintiffs have ground for belief and *approved* that it may execute its threat of cutting off and discontinuing furnishing current to plaintiff North Carolina Public Service Company sooner than the said date; that such action upon the part of the defendant would throw the cities of Greensboro and High Point in darkness, cause

many business establishments to be without electric current
S9 for power, throw a large number of men out of employment, render the plaintiff North Carolina Public Service Company unable to operate its street car systems in the cities aforesaid, and on account of these and other inconveniences of not having electric current, would cause the plaintiff and the citizens of Greensboro and High Point irreparable harm and damage; that the plaintiffs have no other means of obtaining electric current except by purchasing the same from the Southern Power Company; that they are ready, able and willing to pay said Southern Power Company for said current, and to pay same in advance, or make a deposit or give bond to secure the payment of current which may be supplied by order of this Court to the plaintiffs herein, and to comply with any other reasonable requirement of the Court.

That the Southern Power Company in this action has made a motion for removal of the same to the United States District Court of the Western District of North Carolina; that this Court denied said motion or petition, and from the order of this Court denying said petition the defendant appealed to the Supreme Court of North Carolina, and that said Court has approved the action of the Superior Court, and among other things in the opinion of the Supreme Court is the following:

"Thus it clearly appears that the defendant Power Company, while designating January 1st next as the time at which it will sever all connections and service to the plaintiffs, it has in fact asserted its present withdrawal from all obligations and duties owed as a public service company to the plaintiff-."

That affiant is informed and believes that this is a correct statement of the attitude of the defendant, and that it continues to as-

ert that it has the right at any time to withdraw its service from these plaintiffs, and that this affiant and plaintiffs herein fear that it may execute its said threat at any time.

Wherefore, affiant on behalf of petitioners prays the Court to make an order restraining the defendant Southern Power Company from cutting off or ceasing to continue furnishing power to plaintiff North Carolina Public Service Company pending the hearing of this action, and that it further order and require the Southern Power Company to continue to furnish the plaintiffs power upon the same terms and conditions as it is now furnishing the same. (S.) R. J. Hole.

Subscribed and sworn to before me this 3rd day of December, 1920. (S.) John R. Atwell, Notary Public. (Notarial Seal.)

Undertaking.

[Title omitted.]

Whereas, The plaintiff above named has made application to the Judge holding courts in the 12th Judicial District for a restraining order; and

Whereas, The said Judge has granted said restraining order, and has required that plaintiff enter into a bond in the sum of one thousand dollars, as provided by the statute, same to be approved by the Clerk of the Superior Court for Guilford County; and

Whereas, It is the desire of the parties hereto to give such bond;

Now, therefore, know all men by these presents: That North Carolina Public Service Company, a corporation, as principal, and R. J. Hole and W. L. Scott as sureties, acknowledge themselves jointly and severally indebted to the defendant Southern Power Company in the sum of one thousand dollars, good and lawful money of the United States of America, for the payment whereof well and truly to be made, the said principal and the said sureties hereby bind themselves, their heirs, successors, personal representatives and assigns, firmly by these presents.

But the condition of this undertaking is such that if the said plaintiff North Carolina Public Service Company shall pay to said defendant Southern Power Company such damages not exceeding the said sum of one thousand dollars as it may sustain by reason of said restraining order, if the Court shall finally decide that plaintiff was not entitled thereto, then this bond shall become null and void, otherwise to remain in full force and effect.

In testimony whereof, The said North Carolina Public Service Company has caused these presents to be signed in its corporate name by its president and its corporate seal to be hereto affixed and the said R. J. Hole and W. L. Scott have hereunto set their several hands and seals, all done on this the 3rd day of December, 1920. North Carolina Public Service Company, by (S.) R. J. Hole, Vice-President. (S.) W. L. Scott. (Seal.) (S.) R. J. Hole. (Seal.)

NORTH CAROLINA,
Guilford County:

W. L. Scott and R. J. Hole, being duly sworn, deposes and says, each for himself, that he executed the foregoing bond, and that he is worth the sum of one thousand dollars over and above his homestead and personal property exemptions allowed by law and his liabilities. (S.) W. L. Scott. (S.) R. J. Hole.

Sworn to and subscribed before me this 3rd day of December, 1920. (S.) M. W. Gant, Clerk Guilford County Superior Court.

Order.

[Title omitted.]

92 It appearing to the Court from the affidavit of R. J. Hole, and from the complaint in the above entitled action, which complaint is duly verified and referred to and made a part of the affidavit of the said R. J. Hole, that the defendant Southern Power Company is now furnishing current to the plaintiff North Carolina Public Service Company, and that said plaintiff in turn is furnishing electric current to its co-plaintiffs and to the citizens of said cities of Greensboro and High Point; that said North Carolina Public Service Company has no means of generating electric current; that it scrapped its generating plants at the suggestion and on account of the agreement with the defendant; that defendant now threatens to cut off and discontinue furnishing electric current to the plaintiffs, and denies that it owes any present obligation whatever to furnish to the plaintiffs electric current; that plaintiffs have reasonable grounds to apprehend and fear that the said Southern Power Company will cut off and discontinue furnishing current sooner than January 1st, 1921, or that it may discontinue furnishing current at any day; that the said company has in fact asserted its present intention of withdrawal from all obligations and duties owed as a public service company to the plaintiffs; that the cities of Greensboro and High Point and the citizens thereof, as well as the plaintiff Public Service Company, are dependent on the defendant the Southern Power Company for current for lighting said cities, the homes and business houses thereof, furnishing power for many industrial enterprises in said cities, and that they have no other means whatever of obtaining or generating said current, and that if the defendant were to carry out its threat of cutting off said current and withdrawing from performing its public duty of serving the plaintiffs, that plaintiffs and the citizens of the cities aforesaid would suffer irreparable harm and damage.

And it further appearing to the Court that the defendant Southern Power Company is a public service corporation, engaged in the business of selling at wholesale and retail electric current, that it owes the duty to all the plaintiffs and the citizens of said cities of furnishing to them electric current upon proper compensation being made there-

93

for, and the Court finding the other facts set out in the complaint or petition of plaintiff and affidavit of R. J. Hole to be true;

It is now, upon motion of counsel for the plaintiff, ordered and adjudged, That the defendant Southern Power Company, its officers, agents, representatives and servants, be, and they are hereby, restrained from cutting off or discontinuing to furnish to the North Carolina Public Service Company electric current and energy; and that said Southern Power Company, its officers, agents, representatives and servants, be, and they are hereby, ordered and commanded to continue to furnish electric current and power to the plaintiff North Carolina Public Service Company in such amount and quantity as is necessary for its requirements and the needs of the cities of Greensboro and High Point, and the citizens and business enterprises thereof, upon the same terms and conditions as it is now furnishing the same; and the said defendant, its officers, agents and servants are commanded and directed to do any and everything necessary to keep in good condition and repair their transmission lines connecting with the lines of the North Carolina Public Service Company, and to have continuously flowing along said lines electric current and energy in sufficient quantity to supply the needs of plaintiffs and industries to whom the North Carolina Public Service Company owes the duty of furnishing electric current and energy, and that they do nothing or suffer nothing to happen or continue that will prevent electric current being supplied to plaintiffs, as herein provided.

It is further ordered, That defendant Power Company be, and it is hereby, directed to appear before the undersigned Judge of the Superior Court, now holding the courts of the Twelfth Judicial District of the Court House in Greensboro, North Carolina, on December 14th, 1920, at 2.30 o'clock P. M., and show cause, if it has any, why this order should not be continued to the final hearing of the Court.

It is further ordered, That the plaintiffs shall give bond in the sum of \$1,000.00, payable to the defendant, as required by the statute, said bond to be approved by the Clerk of the Superior Court of Guilford County, and that a copy of this order be served on the defendant.

94

This 3rd day of December, 1920. (S.) J. Bis Ray, Judge Holding Courts of the 12th Judicial District.

Notice.

[Title omitted.]

To Messrs. Brooks and Kelly, attorneys for the North Carolina Public Service Company; Mr. Charles A. Hines, attorney for the City of Greensboro, and Mr. Dred Peacock, attorney for the City of High Point:

You and each of you will please take notice that the Southern Power Company, the defendant in the above entitled suit, will on

the thirteenth (13) day of December, A. D. 1920, at 2.30 o'clock P. M., or soon thereafter as counsel can be heard, move the Court for an order removing said suit to the District Court of the United States for the Western District of North Carolina, in accordance with the petition and bond of the defendant, copies of which are hereby attached and the originals whereof will be duly presented to the presiding Judge of said Court and filed in the office of the Clerk of the Superior Court of Guilford County, North Carolina, at the time aforesaid.

Dated the 7th day of December, A. D. 1920. (S.) W. S. O'B. Robinson, Jr., (S.) Cansler & Cansler, (S.) W. P. Bynum, (S.) Justice & Broadhurst, Attorneys for Defendant.

Due service of the foregoing notice, together with the receipt of a copy thereof, and also of the petition and bond therein referred to, is hereby accepted and admitted by each of us.

This 7th day of December, A. D. 1920. Brooks & Kelly, Attorneys for North Carolina Public Service Company. Chas. A. Hines, Attorney for City of Greensboro. Dred Peacock, Attorney for City of High Point.

Petition to Remove This Cause to the United States District Court.

[Title omitted.]

To the Honorable Superior Court of Guilford County, North Carolina:

The petition of the Southern Power Company, appearing specially and for the sole and single purpose of presenting this petition, without acknowledging the jurisdiction of this Court over it or this cause of action, but expressly asserting that this Court has not had jurisdiction of it or of this cause of action since the filing of its first petition to remove this cause to the United States District Court for the Western District of North Carolina, respectfully shows:

I.

96 That heretofore, to-wit, on or about the 2nd day of September, A. D. 1920, the above entitled action, which is a suit of a civil nature, was instituted in this Court by the North Carolina Public Service Company, City of Greensboro and City of High Point, as plaintiffs, against your petitioner, as defendant, and the summons and complaint therein were served on your petitioner on or about the 3rd day of September, A. D. 1920.

II.

That it is alleged in the complaint of the plaintiffs, filed in said suit, that your petitioner, the defendant therein, is a public service corporation engaged in the generation and sale of electricity,

and that it has been and was at the time of the institution of said suit selling electricity to the plaintiff North Carolina Public Service Company for resale to the citizens and inhabitants of the City of Greensboro and the City of High Point and to said cities; and that while your petitioner, as such alleged public service company, was at the time of the institution of said suit duly performing its alleged public duties in the sale of electricity to the plaintiffs to their satisfaction, that it had notified the North Carolina Public Service Company that after January 1st, 1921, it would discontinue the sale of electricity to it for resale in the cities of Greensboro and High Point; and it is alleged that if your petitioner is permitted to cut off its electricity and discontinue furnishing same to said North Carolina Public Service Company after January 1st, 1921, for the uses and purposes aforesaid, untold and irreparable damage will result to the plaintiffs and stagnation of business will follow in said cities and that these conditions will continue until the respective rights of the parties are judicially determined. It is further alleged in the complaint of the plaintiffs, that plaintiffs, City of Greensboro and City of High Point, have a direct interest in seeking to compel your petitioner, as defendant, in said suit, to continue after January 1st, 1921, furnishing electricity to the plaintiff North Carolina Public Service Company for resale in said cities, both on their own behalves as well as on behalf of their respective citizens and inhabitants. The relief prayed by the plaintiffs against your petitioner is that it be required and compelled to continue furnishing electric currents and power to the North Carolina Public Service Company for resale to the citizens and inhabitants of said cities of Greensboro and High Point and to said cities.

97

III.

That the amount of electricity which the plaintiffs are seeking to require and compel your petitioner as defendant in said suit to continue to furnish them greatly exceeded at the time of the commencement of said suit and has ever since exceeded and still exceeds in value the sum of three thousand dollars (\$3,000.00), exclusive of interest and the cost of this action; and also the right in controversy and dispute, to-wit: whether your petitioner can be required and compelled to continue to furnish electricity to the plaintiff, North Carolina Public Service Company, for the uses and purposes alleged in the complaint of the plaintiffs, exceeded at the time of the commencement of said suit and has ever since exceeded and still exceeds the value the sum of three thousand dollars (\$3,000.00), exclusive of interest and cost. That your petitioner, defendant in said suit, disputes and denies and has at all times disputed and denied the alleged cause of action of the plaintiffs and all claims and demands made by them or either of them in said suit. That the controversy in said suit and every issue of fact and law therein was at the time of the commencement thereof, and has since been and still is, wholly between citizens of different States and could at all such times and still can be fully determined as

between them, that is to say, between the plaintiffs and your petitioner, defendant in said suit.

IV.

That your petitioner, the Southern Power Company, defendant in said suit, at the time of the commencement thereof was and has ever since been and still is a foreign corporation, duly organized, created and existing under the laws of the State of New Jersey, and at all such times was and still is a citizen and resident of the State of New Jersey and a non-resident of the State of North Carolina.

V.

That the plaintiffs were each at the time of the commencement of said suit and each has ever since been and still is a corporation organized, created and existing under the laws of the State of North Carolina, and at all such times each was and still is a citizen and resident of the State of North Carolina, of the Western District thereof.

VI.

That said suit by the plaintiffs against your petitioner as defendant, as hereinbefore alleged, is a suit of a civil nature, and the amount in controversy therein exceeded at the time of the commencement of said suit and has ever since exceeded and still exceeds, exclusive of interest and cost, the sum of three thousand dollars (\$3,000).

VII.

That the summons and complaint in said suit were made returnable, according to the terms of said summons, on the 14th day of September, A. D. 1920, at which time your petitioner, as defendant in said suit, was by the laws of the State of North Carolina required to answer the complaint of the plaintiffs. That prior to said return date, to-wit, on or about the 8th day of September, A. D. 1920, your petitioner, as defendant in said suit, duly served upon the plaintiffs written notice of its petition and bond to remove said suit to the United States District Court for the Western District of North Carolina, and thereafter, to-wit, on the 11th day of September, A. D. 1920, in accordance with said prior written notice to the plaintiffs, duly filed in the Superior Court of Guilford County, North Carolina, and presented to the presiding Judge thereof its petition and bond to remove said suit to the United States District Court for the Western District of North Carolina, which said petition and bond were in due form, and your petitioner alleges that before the expiration of the time when it was required by the laws of the State in which said suit was brought to answer or plead to the complaint of the plaintiffs it duly complied in every respect with the Acts of Congress providing for the removal of actions from the courts of

several States to the United States District Court.

VIII.

That notwithstanding that said action of the plaintiffs was in fact brought by them against your petitioner, as defendant in said action, for the purpose of enjoining and restraining your petitioner, as such defendant, from cutting off its electricity and discontinuing furnishing same to the plaintiff North Carolina Public Service Company after January 1st, 1921, for the uses and purposes stated in the complaint of the plaintiffs, and notwithstanding that the plaintiff knew, or as your petitioner is advised and believes should have known, that such was the real nature and purpose of said action, and that said action was in fact one of a civil nature, of which the United States District Court had full and ample jurisdiction under the Acts of Congress, yet the plaintiffs, contriving as your petitioner is advised and believes to wrongfully and unlawfully prevent the removal of said action to the United States District Court, improperly denominated and described said action as a proceeding for a writ of mandamus, and your petitioner's petition to remove said suit to the United States District Court was denied by the Superior Court of Guilford County, North Carolina, and thereafter upon appeal to the Supreme Court of North Carolina, the order of said Superior Court denying said petition was affirmed by the majority of said Supreme Court upon the ground that said action was a proceeding for a writ of mandamus.

IX.

That on or about the 3rd day of December, A. D. 1920, the plaintiffs, still insisting upon proceeding with said suit in the Superior Court of Guilford County, North Carolina, notwithstanding the proceedings for its removal to the United States District Court for the Western District of North Carolina, as aforesaid, caused to be issued out of said Superior Court of Guilford County, North Carolina an alleged order entitled in said suit purporting to restrain and
100 enjoin your petitioner from cutting off or discontinuing to furnish to the North Carolina Public Service Company electric current and energy and purporting to direct and require your petitioner to appear before the presiding Judge of said Superior Court of Guilford County, North Carolina, on the 14th day of December A. D. 1920, at 2.30 o'clock, P. M., and show cause why said alleged order should not thereafter be continued.

X.

That your petitioner avers and shows that said alleged order discloses the real nature of said suit of the plaintiffs and that the same is now and has at all times since its institution been a suit for an injunction and that the description thereof by the plaintiffs as a proceeding for a writ of mandamus was a misnomer and improper description thereof, and further discloses that the United States District Court for the Western District of North Carolina has juris-

diction of said action and that the same should be removed to said Court.

XI.

That your petitioner further alleges that if said suit was not of the character and nature which could be removed to said United States District Court at the time of the filing and presentment of your petitioner's petition and bond as aforesaid (which as your petitioner is advised and believes, with due deference to the holdings to the contrary, is not true), said suit by the issuance of the alleged injunction and restraining order as aforesaid has now been converted by the plaintiffs into a suit against the defendant for an injunction, of which suit the United States District Court for the Western District of North Carolina clearly has jurisdiction, and your petitioner makes and files this petition together with the accompanying bond for the removal of said suit to the United States District Court for the Western District of North Carolina. That this petition and said bond are filed and presented before your petitioner as required by the laws of the State of North Carolina or the rules of the Superior Court of said State to answer or otherwise plead to the affidavit and proceedings of the plaintiffs for said alleged temporary in-
101 junctions or restraining order which, as hereinbefore alleged, purports to be returnable on the 14th day of December A. D. 1920, at 2.30 o'clock, P. M., at which time said order purports to require your petitioner to show cause why said alleged temporary injunction or restraining order should not thereafter be continued, that is to say before your petitioner is required by said laws or rules to answer or otherwise plead to the complaint of the plaintiffs in said suit as now constituted.

Wherefore, Your petitioner makes and files with this petition bond with good and sufficient surety, as provided by the statute in such cases, for its entering a certified copy of the record in this suit in the District Court of the United States for the Western District of North Carolina within thirty (30) days from the filing of this petition and for the payment of such cost as may be awarded herein by said District Court of the United States if said District Court shall hold that said suit was wrongfully or improperly removed thereto and your petitioner prays this honorable Court to proceed no further herein except to accept said bond presented herewith and to make the order of removal as required by law and to cause a transcript of record herein to be duly made and transmitted to the United States District Court for the Western District of North Carolina. Southern Power Company, (S.) by W. S. O'B. Robinson, Jr., Atty.; (S.) Cansler & Cansler, (S.) W. P. Bynum, Jr., (S.) Justice & Broadhurst, Attorneys for the Petitioner Southern Power Company.

STATE OF NORTH CAROLINA,

County of Mecklenburg:

E. C. Marshall being duly sworn, deposes and says that he is an officer of the Southern Power Company, defendant in the above en-

102 titled suit and the petitioner named in the foregoing petition, to wit—its Assistant Secretary and Assistant Treasurer, that he has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. (S.) E. C. Marshall.

Sworn to and subscribed before me this 7th day of December A. D. 1920. (S.) A. W. Brown, Notary Public. [Seal.] My commission expires Jan. 19, 1921.

Bond for Removal.

[Title omitted.]

Know all men by these presents; That Southern Power Company as principal, and Chas. I. Burkholder and E. R. Bucher, as sureties, are held and firmly bound unto North Carolina Public Service Company, City of Greensboro and City of High Point, and all other persons whom it may concern, in the sum of Five hundred dollars (\$500.00) for the payment of which well and truly to be made, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Southern Power Company, having petitioned the Superior Court of Guilford County, in the State of North Carolina, for the removal of a certain cause pending in the Superior Court of said County, wherein North Carolina Public Service Company, City of Greensboro and City of High Point are plaintiffs and Southern Power Company is defendant, to the District Court of the United States for the Western District of North Carolina, for further proceedings on the grounds in said petition set forth.

103 Now, Therefore, if the Southern Power Company, the petitioner, shall enter into the said District Court of the United States within thirty days after the date of filing of said petition, a certified copy of the record in such suit, and shall well and truly pay all costs that may be awarded by the said District Court of the United States if the said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain full force and virtue.

Witness our hands and seals this the 7th day of Dec. A. D. 1920. Southern Power Company, (S.) by E. C. Marshall, Assistant Secretary and Assistant Treasurer. Chas. I. Burkholder. (Seal.) E. R. Bucher. (Seal.)

STATE OF NORTH CAROLINA,
County of Mecklenburg:

Chas. I. Burkholder and E. R. Bucher, the sureties named in the foregoing bond, being first duly sworn, each for himself, deposes

and says as follows: I am the same person whose name is subscribed to the foregoing bond and I am a resident and freeholder of the County and State aforesaid, and I am worth double the sum of five hundred dollars (\$500.00) named herein, as the penalty thereof over and above all my just debts and liabilities and exclusive of property which is exempt from execution. (S.) Chas. I. Burkholder. (S.) E. R. Bucher.

Sworn to and subscribed before me this 7th day of Dec. A. D. 1920. (S.) D. C. Carmichael. My com. ex. Aug. 10, '22.

[Title omitted.]

This cause coming on to be heard before the undersigned Judge holding courts of the 12th Judicial District, at the court house Greensboro on December 13th, 1920, upon the motion of the plaintiffs for judgment upon the pleadings, and upon the second petition and bond of the defendant for removal of this cause to the District Court of the United States for the Western District of North Carolina, of which petition and bond the plaintiffs were given due notice and which were duly filed with the Clerk as appears of record, and the Court having heard both motions together and argument of counsel thereon, finds the following facts, to-wit:

That a proceeding for mandamus was instituted by the North Carolina Public Service Company, City of Greensboro and City of High Point against the Southern Power Company, summons having been issued on the 2nd day of September, 1920, by the Clerk of the Superior Court of Guilford County, and made returnable before the undersigned Judge, at the court house in Greensboro, on Tuesday, the 14th day of September, 1920.

That said summons, together with a copy of the complaint, was duly served upon the plaintiff on the 3rd day of September, 1920. That thereafter the defendant filed its petition and bond for removal of this cause to the United States District Court for the Western District of North Carolina, pursuant to written notice duly given plaintiffs, and upon hearing said petition the Court denied the same. That upon the order of the Court denying said petition for removal, the defendant appealed to the Supreme Court of North Carolina, and that the said Supreme Court affirmed the judgment of this Court denying said petition for removal, and that a
105 copy of said opinion has been duly certified by the Clerk of the Supreme Court and sent down to this court.

That on the 2nd day of December, 1920, the plaintiffs appealed to the undersigned Judge holding the courts of the 12th Judicial District for a temporary order in the mandamus proceedings, restraining the defendant from cutting off and ceasing to continue furnishing electric power and energy to plaintiff Public Service Company pending a final hearing and determination of this action

for mandamus, said application being made under Section 811 to 815 of the Revisal of North Carolina. That upon considering the affidavits filed the Court granted a temporary restraining order to prevent the defendant from cutting off electric power and energy from plaintiffs, and requiring the defendant to continue to furnish electric power and current to the plaintiff Public Service Company, and further requiring the defendant to appear before the undersigned on December 14th, 1920, at the Court House in Greensboro, North Carolina, to show cause, if any it had, why the restraining order should not be continued to the final hearing of the cause. That the plaintiffs were required to give bond in the sum of \$100.00, to be approved by the Court. That said bond was given and approved by the Court, and that a copy of said restraining order and notice was served on the defendant on the 4th day of December, 1920. That on the convening of a term of the Superior Court of Guilford County on the 15th day of December, 1920, plaintiffs through their attorneys filed with the undersigned Judge a motion in writing, which is as follows:

"Now comes the plaintiff, North Carolina Public Service Company, City of Greensboro and City of High Point, upon the convening of the Court at 10 o'clock a. m. on the 13th day of December, 1920, and moves the court for final judgment upon the complaint and answer now on file in the above-entitled cause granting a peremptory writ of mandamus against the defendant, commanding and requiring it to continue to furnish electric energy and current to the plaintiffs at Greensboro and High Point."

106 That thereupon the Court directed that a copy of said motion be furnished to counsel for the defendant, and a copy of same was immediately delivered to counsel for defendant. Upon the interrogation of counsel as to when the Court would hear their respective motions, the Court announced that it would hear argument upon the motions at 2 o'clock p. m. of said day; that at 2 o'clock on said day counsel for both plaintiffs and defendant appeared before the undersigned Judge at the court house in Greensboro. Counsel for defendant called its second petition for the removal of this cause to the United States District Court for the Western District of North Carolina. Counsel for plaintiffs stated that they understood the Court was to hear the motion of plaintiffs for Judgment upon the pleadings. Thereupon the Court stated that it would hear both motions together, to which no objection was offered.

That the Court's attention was first called to defendant's petition of removal after the plaintiffs had filed their motion for judgment upon the pleadings, and the petition for removal was presented to the undersigned Judge at 2 o'clock p. m., December 13th. That the notice served upon counsel for plaintiffs of the purpose of defendant to file with the undersigned this petition for removal was as follows:

"You and each of you will please take notice that the Southern Power Company, the defendant in the above-entitled suit, will on the thirteenth (13) day of December, A. D., 1920, at 2:30 o'clock p. m., or — soon thereafter as counsel can be heard, move the Court for an order removing said suit to the District Court of the United States for the Western District of North Carolina, in accordance with the petition and bond of the defendant, copies of which are hereby attached and the originals whereof will be duly presented to the Presiding Judge of said court of Guilford County, North Carolina, at the time aforesaid.

Dated the 7 day of December, A. D., 1920."

The argument proceeded upon the two motions, and pending the argument the Court announced that it would deny the petition for removal, whereupon counsel for defendant said: "We except and give notice of appeal to the Supreme Court." Counsel for 107 defendant then insisted that the Court should not hear further argument upon the motion for judgment upon the pleadings. The Court stated that as it had announced in the outset that it would hear arguments upon both motions together, and that as yet no judgment or order had been entered from which the defendant could appeal, that the Court would proceed to hear and dispose of both motions together, and determine both in the same judgment, to which the defendant excepted.

Counsel for defendant then stated that they had not been given proper notice of the motion for judgment upon the pleadings. To this suggestion the Court stated that it had announced in the outset that it would hear this motion together with the motion to remove, and that no objection was made to it at the time, and that the argument had proceeded upon this understanding by the Court and that as the question at issue involved the construction and interpretation of the complaint and answer only, the Court was of opinion that the defendant's objection to lack of notice was without merit, and that the Court would proceed to dispose of the entire matter, to which the defendant duly excepted. Counsel for the defendant also then demanded that a jury trial be had to determine the disputed facts raised by the pleadings. This request was not made, however, until after the argument upon the motion had been made, as above indicated. The motion of the plaintiffs being for judgment upon the pleadings, and the Court being of the opinion that the plaintiff was entitled to such judgment upon the admitted and undisputed facts appearing in the complaint and answer, declined to grant a jury trial, and stated that the Court would render judgment upon the pleadings for a peremptory writ of mandamus, as prayed by the plaintiffs, to which the defendants duly excepted. Counsel for the defendant then inquired of the Court what disposition it would make of the temporary restraining order heretofore issued in the cause, to which the Court announced that the granting of the peremptory writ of mandamus necessarily absorbed and dissolved the restraining order, and that the judgment granting a peremptory writ of mandamus

necessarily carried with it the order of the court requiring the continuation of service by the defendant to the plaintiffs.

108 And now the Court, upon considering the complaint and answer filed in this cause and the argument of counsel, is of the opinion from the undisputed facts alleged in the complaint and answer, and the facts alleged in the complaint, which are not denied, that the plaintiffs are entitled to judgment for a peremptory writ of mandamus upon said pleadings.

It is now upon motion of counsel for plaintiffs, ordered, adjudged and decreed, That the defendant be, and it is hereby required, directed and commanded to continue to furnish upon the same terms and conditions as it is now furnishing the same electric power, current and energy to the plaintiff North Carolina Public Service Company in sufficient quantity to supply adequately the needs of said North Carolina Public Service Company and the other plaintiffs herein, and all other customers of said North Carolina Public Service Company, and to this end it is directed and commanded to keep up connections of electric wires and cables which defendant now has with said North Carolina Public Service Company at or near Greensboro and High Point, and to keep its cables and said connections in good condition and repair, so that there shall continuously flow upon and along the wires and cables of said defendant and to the wires and cables of the plaintiff North Carolina Public Service Company sufficient electric energy and power to provide at all times a sufficient and adequate supply of electric current and energy, so that said North Carolina Public Service Company may be able to give efficient service and supply of electric current and power to the other plaintiffs herein and the consuming public taking therefrom. The rates and terms of payment for said electric current shall be such as now exists between plaintiff North Carolina Public Service Company and defendant, or as same may hereafter be fixed and determined by the North Carolina Corporation Commission.

And upon consideration of the petition for removal of this cause to the District Court of the United States for the Western District of North Carolina, the Court is of the opinion that the temporary restraining order heretofore issued by this Court is ancillary to this proceeding for mandamus and does not change the cause of action to a suit for injunction, as contended by defendant, but this proceeding has been and still remains an action for mandamus, 100 as shown by the complaint, and after inspecting the said petition and bond the Court is of the opinion that said petition and bond are in due form and otherwise legally sufficient. The Court, however, refuses and declines to allow said petition, and refuses the removal of this action to the to the United States District Court for the Western District of North Carolina, upon the ground that the complaint filed hereing by plaintiff states a cause of action for mandamus, and that the United States District Court has no original jurisdiction of such a proceeding, and could not entertain jurisdiction of the action set forth in the complaint, and that this Court does have jurisdiction of same. J. Bis Ray, Judge holding courts of the 12th Judicial District.

Clerk's Certificate.

The defendant excepted to the foregoing order and judgment and the several parts thereof, and gave notice of appeal to the Supreme Court in open Court. Notice of appeal waived and appeal bond in the sum of \$50.00 adjudged sufficient. It was agreed that the record herein shall constitute statement of case on appeal to the Supreme Court, and the defendant shall have leave, if it so desires, to specifically assign errors to the foregoing rulings, order and judgment, by an assignment of errors to be filed within 60 days from the date thereof; It is agreed that the defendant shall have reviewed on appeal all of its exceptions and assignments of error and but a single record shall be made up and certified to the Supreme Court.

This 14th day of December, 1920. J. Bis Ray, Judge Presiding.

Clerk's Certificate.

[Filed Jan. 10, 1921.]

[Title omitted.]

110 I, M. W. Gant, Clerk of the Superior Court of Guilford County, North Carolina, hereby certify the above and foregoing to be a true and correct copy of the record of proceedings had and taken in said Court subsequent to the filing of the defendant's first petition to remove the above entitled cause to the United States District Court for the Western District of North Carolina, said record of proceedings consisting of the affidavit of R. J. Hole, filed by the plaintiffs for the purpose of obtaining a temporary restraining order in said cause, and undertaking of the plaintiffs filed by them to indemnify the defendant against loss or damage by reason of the granting of said temporary restraining order, the order of his Honor, J. Bis Ray, Judge presiding over said Court granting the plaintiffs the temporary restraining order applied for, the notice, petition and bond of the defendant for the removal of said cause to the United States District Court for the Western District of North Carolina, and the order and judgment of his Honor J. Bis Ray, Judge presiding over said Court dated the 14th day of December A. D. 1920, all as appears on file and of record in my office.

In Witness whereof I have hereunto set my hand and affixed my official seal on this the 10th day of January A. D. 1921. M. W. Gant, Clerk of the Superior Court of Guilford County, N. C., by H. C. Wilson, D. C. [Seal.]

Filed in this office, Jany. 10, 1921. R. L. Blaylock, Clerk.

Supplemental Petition.

Filed May 13, 1921.

In the District Court of the United States for the Western District
of North Carolina, at Greensboro.

In Equity.

111

[Title omitted.]

Now comes the Southern Power Company and in addition to the facts shown in its original answer to the bill of complaint of the plaintiffs herein respectfully shows the Court:

I.

That notwithstanding the fact that this suit was heretofore, as will appear from the record herein, duly removed from the Superior Court of Guilford County, North Carolina, to this Court and that subsequent to such removal, to-wit, on the 22nd day of December, A. D., 1920, upon the motion of the plaintiffs herein to remand said suit to the Superior Court of Guilford County, North Carolina, this Court held that it has jurisdiction of said suit and accordingly refused to grant the motion of the plaintiffs to remand the same, plaintiffs have threatened and are about to proceed with the prosecution of said suit in the Superior Court of Guilford County, North Carolina, to the great prejudice and injury of this defendant and in violation of the rights of this defendant under the constitution and laws of the United States.

II.

That the purpose of the plaintiff, North Carolina Public Service Company, in undertaking to proceed with the prosecution of said suit in the Superior Court of Guilford County, North Carolina, is to acquire the defendant's electricity and property without due process of law and without paying therefor, or, at most, paying considerably less than the cost of its production. That said North Carolina Public Service Company has not paid the defendant any sum whatsoever for the electricity furnished said North Carolina Public Service Company at Greensboro and High Point for more than four (4) months past, and leaving out of consideration other amounts due the defendant by said North Carolina Public Service Company, it is indebted to the defendant for electricity furnished it at Greensboro and High Point during the months of January, February, March and April, 1921, in the sum of Sixty-seven Thousand Eight Dollars and Ninety Cents (\$67,008.90) all of which said indebtedness remains due and unpaid; and as this defendant is advised and believes, said North Carolina Public Service Company hopes to

112

continue the use of this defendant's electricity at Greensboro and High Point without paying anything therefor, or, at most, paying therefor considerably less than the cost of producing said electricity by harassing this defendant through unlawful attempts to proceed against it in said Superior Court of Guilford County, North Carolina, in violation of the rights of this defendant to have said suit tried in this Court, and, as this defendant is advised and believes, said plaintiffs will, unless forthwith enjoined, and restrained from doing so, immediately attempt to proceed further against this defendant in the Superior Court of Guilford County, North Carolina, and to obtain from said Court an order purporting to require this defendant to continue furnishing electricity to said North Carolina Public Service Company, notwithstanding the facts hereinbefore alleged.

III.

That this defendant deems it not improper for it to allege in this connection that it has heretofore, at all times, sought to avoid any controversy with the plaintiffs, Cities of Greensboro and High Point, and has, at no time, taken any action in the protection of its own rights that might in any way embarrass or inconvenience said cities, their citizens and inhabitants, and it expressly avers, without however waiving any of its legal rights in this suit, that it shall continue in the future to so far as possible take no action in the protection of its rights that may cause inconvenience or embarrassment to said cities, their citizens or inhabitants, to the end that so far as this defendant is concerned they may not be prejudiced as the result of the litigation between it and the North Carolina Public Service Company; but this defendant avers that, as it is advised and believes, it is under no obligation to serve said cities, their citizens and inhabitants, through the agency of the North Carolina Public Service Company and is, as it is further informed and believes, entitled to be freed from any interference from or molestation by said North Carolina Public Service Company.

Wherefore, This defendant being without remedy against the plaintiffs, according to the course and practice of the common law, prays this Honorable Court that said North Carolina Public Service Company, City of Greensboro and City of High Point, and their, and each of their officers, attorneys, agents, employees and confederates be enjoined from directly or indirectly proceeding further with the prosecution of said suit against this defendant in the Superior Court of Guilford County, North Carolina, or in any other court than this Court, and that all other proper relief in the premises may be granted to it. Bynum, W. S. O'B. Robinson, E. T. Cansler, Broadhurst & Cox, Attorneys for the Defendant Southern Power Company.

STATE OF NORTH CAROLINA,
County of Mecklenburg:

D. C. Carmichael, being first duly sworn, deposes and says that he is an Officer of the Southern Power Company, the defendant named in the above entitled suit, to-wit, its Asst. Secretary, that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to such matters, he believes it to be true. D. C. Carmichael.

Sworn to and subscribed before me this, the 13 day of May, A. D. 1921. A. W. Brown, Notary Public. My Commission expires June 19, 1921.

114

Order.

Filed May 13, 1921.

[Title omitted.]

Upon reading the supplemental petition of the defendant, Southern Power Company, duly verified and filed in this suit, as well as the original answer of said defendant filed herein:

It is now upon motion of Counsel for the defendant, the Southern Power Company, ordered that the plaintiffs, North Carolina Public Service Company, City of Greensboro and City of High Point be, and each of them hereby is directed to appear before me in the Federal Court room in the City of Greensboro on the 21st day of May, 1921, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, and show cause, if any they have, why they and each of them, their officers, attorneys, agents, employees and confederates should not be enjoined from directly or indirectly proceeding or attempting to proceed in said suit entitled as above shown against the defendant, the Southern Power Company, in the Superior Court of Guilford County, North Carolina, or in any other court than this Court.

And it appearing to the Court from said supplemental petition that this is a case in which a temporary restraining order should be granted forthwith it is further ordered upon motion of Counsel for the defendant that in the meantime the said plaintiffs and each of them and their officers, attorneys, agents, employees and confederates are hereby enjoined and restrained until the further order of this Court from directly or indirectly proceeding or attempting to proceed further in any manner whatsoever in the prosecution of said suit against the defendant in the Superior Court of Guilford County, North Carolina, or in any other court than this Court, or from taking any action in said suit of any nature whatsoever in said Superior Court of Guilford County, North Carolina, or in any other court than this Court.

The Clerk will enter this order at Greensboro and cause a certified copy hereof, together with a copy of the supplemental petition of the defendant, to be served upon each of the plaintiffs.

This 13 day of May, A. D., 1921. Jas. E. Boyd, United States Judge.

Received May 13, 1921, Served May the 13th, 1921, on R. J. Hole, Vice-President of North Carolina Public Service Co., Claud Kiser, Mayor of the City of Greensboro, and John W. Hedric Mayor of the City of High Point, by delivering to each a copy of the within order, together with a copy of the supplemental petition. Chas. A. Webb, U. S. M., by C. T. Roane, D. M.

Reply to Supplemental Petition.

[Filed May 21, 1921.]

[Title omitted.]

Now comes the plaintiffs, North Carolina Public Service Company, City of Greensboro and City of High Point, in the above-entitled proceedings, reserving their exceptions heretofore entered to the jurisdiction, and re-asserting the matters and things set
116 forth in their reply heretofore filed to the defendant's answer in the above-entitled suit now docketed in this Court, and further answering the petition of the defendant Southern Power Company herein filed, says:

I.

That replying to the allegations of paragraph one of the supplemental petition, plaintiffs admit that a transcript of its proceedings instituted in the Superior Court of Guilford County, North Carolina, was taken from said Court and docketed in this Court, and that on the 22nd day of December, 1920, this Court entered an order declining to remand said proceedings to the Superior Court of Guilford County, North Carolina, for trial; that all other allegations of said article, averring that these plaintiffs are threatening to prosecute their suit in the Courts of North Carolina to the great prejudice and injury of this defendant, and in violation of its rights under the Constitution and laws of the United States is untrue and denied; that the facts with relation to their suit in the State Courts are hereinafter fully and correctly set forth.

II.

That the allegations contained in paragraph two of defendant's supplemental petition are untrue and denied, except as hereinafter admitted.

III.

That the allegations of fact contained in paragraph three are untrue and denied. That as to the conclusions of law therein set out, plaintiffs are advised and believe, and so aver, that the same are incorrect, and do not properly state the defendant's duties and obligations in the premises.

Further answering, and further replying to defendant's original and supplemental petition, plaintiffs say:

I.

That the defendant on the 14th day of September, 1920,
117 filed a transcript of the record for removal with this Court, and shortly thereafter filed its answer, setting forth that the State Court had no jurisdiction to proceed further with the hearing of said suit, and that this Court should enjoin any further action on behalf of the plaintiffs in the prosecution of said suit in the State Courts. That the defendant, however, did not ask this Court for an order restraining the plaintiffs, but elected to proceed in the State Courts in various and sundry ways to protect and defend its rights in that jurisdiction. That while the litigation was thus being continued in the State Court between the parties, the plaintiffs herein on the 2nd day of December, 1920, filed an application with Judge J. Bis Ray, holding the Superior Courts for the State of North Carolina, in the 12th Judicial District, in which Guilford County is situated, and obtained from said Judge a temporary restraining order against the defendant, preventing it from cutting off the current as furnished the plaintiffs in Greensboro and High Point until the final disposition of the original mandamus suit. That the Judge of the State Court cited the defendant to appear before him at the Court house in Greensboro, North Carolina, on December 14th, 1920, to show cause, if any it had, why the restraining order should not be continued to the final hearing of the mandamus. That the defendant thereafter elected to appear, and did appear before the Judge of the Superior Court on the 14th day of December, 1920, and filed another petition to remove said suit to this Court, and also appeared and answered a motion made by the plaintiffs for judgment absolute in the original mandamus suit upon the pleadings; that these motions were by consent argued together, and the presiding Judge declined to remove the suit, upon the grounds that the temporary restraining order was merely ancillary to the original suit, and was not therefore removable; and further, that the plaintiffs were entitled to a peremptory writ of mandamus upon the admitted and uncontraverted facts of the pleadings, all of which appear from a judgment duly signed by Judge Ray of the Superior Court of Guilford County, North Carolina, a copy of which said judgment is hereto attached and prayed to be taken as a part of this answer.
118 That thereafter the defendant elected and did give notice of appeal, and perfected its appeal to the Supreme Court of North Carolina, and appeared before the Supreme Court of the State of North Carolina through counsel and argues said appeal; that the Supreme Court of North Carolina thereafter, to-wit, on the — day of —, 19—, handed down its judgment, unanimously holding that the original suit as constituted in the Superior Court of Guilford County was a proceeding for mandamus, and that that Court had jurisdiction of same, and that the application for a restraining

order above referred to was not a new suit, but merely ancillary to the original suit, and was not removable, and remanded the case to the Superior Court of Guilford County, to be heard and determined upon certain disputed facts arising in the pleadings, a copy of which said judgment of the Supreme Court of North Carolina is hereto attached and prayed to be taken as a part of this answer.

II.

That the restraining order preventing defendants from cutting off the current and discontinuing furnishing electric energy to the plaintiff is still in force.

III.

That plaintiffs are advised and believe, and so aver, that in a case of this character, where the suit was originally instituted in the State Court and is for mandamus that the Federal Courts have no jurisdiction of same, and such suit is not removable to the Federal Courts for trial, and that upon the question for the right to remove, where the record discloses merely a question of law as to the character of suit instituted, that the State Courts have the right to pass upon and determine this question and proceed to final judgment, notwithstanding the filing of the transcript of said petition to remove in the Federal Court.

IV.

119 That plaintiffs are advised and believe that according to the rules and practices of the Federal Courts, as announced by the Supreme Court of the United States, "It is well settled that if upon the face of the record, including a petition for removal, a suit does not appear to be a removable one, that the State Court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made."

V.

That plaintiffs are further advised and aver that, according to the procedure and practice of this Court, a defendant in such a case as here presented ought not to be, and will not be allowed after filing a transcript of its petition to remove to this Court, to continue to defend the action, and seek to have established its rights in the Courts of the State until all of the questions of law involved in the original suit are decided adversely to it, and then appeal to this Court to obtain an injunction restraining the plaintiffs from securing final judgment in accordance with the procedure and practices of the State Court, to which it has thus voluntarily continued to submit its rights.

VI.

That the plaintiffs are advised and believe, and so aver, that the effort of the defendant in this proceeding to have the plaintiffs now enjoined from further prosecuting their suit in the State Court is to deny to the plaintiffs and the State Courts the privileges and the comity expressly accorded by the laws of the Federal Government, and the decision of the Courts of the United States to proceed to final judgment.

VII.

That the defendant Power Company since the institution of this mandamus proceeding in the State Court has submitted to the jurisdiction of the Corporation Commission of North Carolina, and filed an application asking this Commission to fix the rates which it should be permitted to charge a number of local public utility companies doing business in North Carolina, to which the defendant has been and is now furnishing electric energy and current for re-sale in various municipalities in said State, and also to fix the rates which it should charge for energy and current sold to textile mills and various other industries located in the State of North Carolina and is asserting that the Corporation Commission of North Carolina alone has the power and authority to fix and prescribe rates which it shall charge to consumers in the State of North Carolina.

VIII.

That further answering, The plaintiff North Carolina Public Service Company expressly denies that it owes the defendant any sum for electric current and energy furnished it which it has not already paid or offered to pay. That, as appears from the transcript of the record heretofore filed in this Court, the defendant voluntarily fixed the rate which it proposed to charge plaintiff North Carolina Public Service Company for electric energy and current furnished it at Greensboro and High Point during the year 1920, and that monthly bills were accordingly so rendered the North Carolina Public Service Company and paid by it to the defendant.

IX.

That notwithstanding the acceptance of these monthly payments, the defendant is now claiming that it ought to have charged and collected a higher rate, and that the plaintiff North Carolina Public Service Company should pay it on account of this unfounded and unjust claim the sum of sixty odd thousand dollars mentioned in the supplemental petition. That, as appears from the judgment of Judge Ray in the Superior Court of Guilford County, North Carolina, wherein a mandatory injunction was granted against the

defendant, the Court directed that the plaintiffs should continue to pay the same amount for electric energy furnished which it was then paying to the defendant for same, until the Corporation

Commission of the State of North Carolina should fix a
121 different rate. That accordingly the plaintiff North Caro-

lina Public Service Company tendered monthly checks for the months of January, February and March to the defendant Power Company for all the electric energy and power furnished it at Greensboro and High Point, in accordance with the amount of current consumed, as per bills furnished by the defendant, and at the rate which it had theretofore paid for such current, all in obedience to the order of the Superior Court of Guilford County. That the defendant declined to accept such checks, and the plaintiff North Carolina Public Service Company has deposited same to a special account in a bank in the City of Greensboro for the use and benefit of the defendant Power Company.

X.

That the plaintiff North Carolina Public Service Company has not only paid the defendant Power Company for current rendered it up to January 1st, 1921, but has tendered it checks for all current furnished it in January, February and March, 1921, in exact accordance with the decree of the Superior Court of Guilford County. That in addition to this, the North Carolina Public Service Company stands ready to give bond with approved sureties to pay the defendant such amount for current to be furnished it, and upon such terms and conditions as the Court may direct. That plaintiff avers that in the light of these facts there is no occasion for this Court to restrain them in the prosecution of their rights in the State Court, even though this Court does not remand the suit.

XI.

That the defendant Power Company until recently has denied the right of the courts of the State Corporation Commission to regulate and control its service and rates with relation to customers which it served in North Carolina. That pursuing this policy of fixing its own rates unregulated by governmental control, the defendant Power Company has been charging different rates to like
122 customers for the same amount of current and energy furnished them, and these discriminations have been both unjust and gross. That for eighteen months last past defendant Power Company has been charging the plaintiff North Carolina Public Service Company for electric current and energy furnished it at Salisbury, North Carolina, 1.88 mills per KWH., and at the same time selling similar quantities of current to other consumers in North Carolina at 8 mills per KWH. That a suit for mandamus is now pending in the Superior Court of Guilford County between the plaintiff North Carolina Public Service Company and the defendant Power Company, requiring it to continue to furnish

service to the Public Company at Salisbury. That in this suit plaintiff has sought to obtain copies of contracts which the defendant Power Company has with other customers for current, in order to establish the unjust and unlawful discrimination in rates for like service which the defendant Power Company is rendering. That the Plaintiff North Carolina Public Service Company secured an order in that suit from the Judge of the Superior Court of Guilford County, directing defendant Power Company to furnish it copies of such contracts; that the defendant appealed from this order to the Supreme Court of the State, and the Supreme Court affirmed the order below and directed the Power Company to furnish copies of these contracts; that notwithstanding said order, and although more than six months has elapsed, the defendant has not yet furnished the plaintiff copies of such contracts, and still withholds the same.

XII.

That the plaintiffs aver that the proceedings instituted in the State Courts against the defendant *was* brought under a legislative statute, particularly prescribing the procedure for mandamus, which is totally different from the procedure prescribed for mandatory injunctions, and that this proceeding is therefore for mandamus or nothing, and that the plaintiffs have and are only seeking in the State Courts to protect their rights and property against the unjust actions of the defendant.

123-128 Wherefore, Plaintiffs renew their prayer that this proceeding be remanded to the State Court for trial and judgment, and that the temporary restraining order herein granted be dismissed. Brooks & Kelly, Attorneys for North Carolina Public Service Co. Chas. A. Hines, Attorney for City of Greensboro. Fred Peacock, Attorney for City of High Point.

NORTH CAROLINA,
Guilford County:

R. J. Hole first being duly sworn, deposes and says; That he is Vice-President and General Manager of the North Carolina Public Service Company, one of the plaintiffs herein; that he has read the foregoing Reply, and that same is true of his own knowledge, except as to the matters and things therein states on information and belief, and as to those, he believes it to be true. R. J. Hole.

Sworn to and subscribed before me, this 20th day of May, 1921.
Florence C. Monroe, Notary Public. (Seal.) My Commission expires March 17th, 1923.

Judgment of Superior Court of Guilford County.

[Omitted; printed p. 104.]

129

Order Continuing Restraining Order.

[Filed May 21, 1921.]

[Title omitted.]

130

This cause came on to be further heard at Chambers, this the 21st day of May 1921, upon the order heretofore issued, to-wit; on the 13th day of May 1921, requiring the plaintiffs, the North Carolina Public Service Company, the City of Greensboro and the City of High Point, to appear before this Court in the Federal Court room in the City of Greensboro on the 21st day of May 1921, at 11 o'clock, A. M., and show cause if any they have, why they and each of them, their officers, attorneys, agents and employees, should not be enjoined and restrained from further proceeding or attempting to proceed in this suit in the Superior Court of Guilford County, North Carolina, or in any other Court than this Court, and in the meantime enjoining and restraining the said plaintiffs until the further order of this Court from directly or indirectly proceeding in any manner whatsoever in the prosecution of the said suit against the defendant in the said Superior Court of Guilford County; and the plaintiffs having this day appeared, the motion was argued by counsel; and thereupon, upon consideration thereof it is ordered, adjudged and decreed that the temporary restraining order heretofore issued by this Court, to-wit; on the 13th day of May 1921, enjoining and restraining the plaintiffs, their officers, attorneys, agents and employees from further proceeding directly or indirectly in this action in the Superior Court of Guilford County, N. C., or in any other court than this Court, be and the same is hereby continued until the hearing and trial of this suit.

This order, however, shall not operate to prevent the plaintiffs or either of them from applying to the Supreme Court of North Carolina for a re-hearing of the appeal decided and determined by the said Court at its present term, to-wit; the Spring term 1921, in this action, said appeal having been originally taken by the defendant from a judgment of the Superior Court of Guilford County, N. C., rendered at the December term 1920, in this case.

It is further ordered that this suit be and is hereby set down for hearing and trial in this Court on the 16th day of June 1921, at Greensboro, N. C., at ten o'clock, A. M.

131

This the 21st day of May 1921. Jas. E. Boyd, United States District Judge.

The counsel for plaintiff enters an exception to this order. Jas. E. Boyd, U. S. Judge.

Petition of the Southern Power Co.

[Filed June 9, 1921.]

[Title omitted.]

The petition of the Southern Power Company respectively represents:

I.

That, as petitioner is informed and believes, the North Carolina Public Service Company has made contracts with consumers in Greensboro and High Point and vicinity for the sale of electricity purchased by said North Carolina Public Service Company from your petitioner with the parties enumerated upon Exhibit No. 1, hereto attached and made a part of this petition, and, as petitioner is further informed and believes, said North Carolina Public Service Company has in its possession the written contracts made and entered into with said parties.

132

II.

That in order for this petitioner to properly conduct its defense of this suit it is necessary for it to have upon the trial of this suit, in order to be able to introduce the same in evidence, the contracts enumerated upon said Exhibit No. 1. That said contracts when produced will, as this petitioner is informed and believes, show that said North Carolina Public Service Company is selling the electricity, which it acquired from petitioner, in competition with petitioner. Said contracts will further show, or tend to show, that the demands which the North Carolina Public Service Company is making upon your petitioner in this suit are unreasonable and such as, if allowed, will be destructive of your petitioner's business.

III.

That the North Carolina Public Service Company has in its possession the schedule of prices and rates under which it resells the electricity which it purchases from your petitioner and also has in its possession the schedule of prices and rates which it had in force and effect prior to April 1, 1919, and under which it resold said electricity. That it is necessary for your petitioner, in order to properly conduct its defense of this suit, to have upon the trial thereof said schedule of rates, in order that it may be able to introduce same in evidence. That said schedule of rates if produced will show the profit which said North Carolina Public Service Company makes and formerly made upon the electricity which it acquired from this petitioner and will support the claim of petitioner that to require it to sell electricity to said North Carolina Public Service Company for redistribution not only deprives your peti-

tioner of its property without due process of law, but is also detrimental to the consuming public.

Wherefore, your petitioner prays this Honorable Court to make an order requiring said North Carolina Public Service Company to have and produce upon the trial of this suit, on June 16, 1921, the contracts, papers and documents herein set forth, described and enumerated upon Exhibit No. 1 hereto attached, and made a part of this petition. W. P. Bynum, E. T. Cansler, W. S. O'B. Robinson, Jr., Attorneys for the Southern Power Company, Petitioner.

STATE OF NORTH CAROLINA,
County of Mecklenberg:

E. R. Backer, being first duly sworn, deposes and says that he is an officer of the Southern Power Company. the defendant named in the above entitled suit, to-wit; its Asst. Treasurer, that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to such matters, he believes it to be true. E. R. Backer.

Sworn to and subscribed before me this the 8th day of June A. D. 1921. D. C. Carmichael, Notary Public, Mecklenberg County, N. C. (Seal.) My commission expires Aug. 10, 1922.

Exhibit No. 1.

1. Contracts between the North Carolina Public Service Company and the City of High Point, especially the contract under which the North Carolina Public Service Company sells electricity to the City of High Point for re-sale and distribution by the latter, and the contract under which the North Carolina Public Service Company sells electricity to the City of High Point for operating its pumping plant.

2. Contracts between the North Carolina Public Service Company and the Durham Hosiery Mills, Incorporated at or near High Point, N. C.

3. Contracts between the North Carolina Public Service Company and the High Point Hosiery Mills, Incorporated, at or near High Point, N. C.

4. Contracts between the North Carolina Public Service Company and the Piedmont Hosiery Mills Co., at or near High Point, N. C.

5. Contracts between the Moffat Underwear Company, at or near High Point, N. C.

6. Contracts between the North Carolina Public Service Company and Fred B. Rhodes Company, at or near High Point, N. C.

7. Contracts between the North Carolina Public Service Company and the Melton Rhodes Company, at or near High Point, N. C.

8. Contracts between the North Carolina Public Service Company and the Stehile Silk Corporation, at or near High Point, N. C.

9. Contracts between the North Carolina Public Service Company

and the Raymond Veneer Manufacturing Company, at or near High Point, N. C.

10. Contracts between the North Carolina Public Service Company and the Peerless Veneer Company, at or near High Point, N. C.

11. Contracts between the North Carolina Public Service Company and Swift Fertilizer Company, at or near Greensboro, N. C.

12. Contracts between the North Carolina Public Service Company and Artic Ice & Fuel Company, at or near Greensboro, N. C.

13. Contracts between the North Carolina Public Service Company and Armour Fertilizer Company at or near Greensboro, N. C.

14. Contracts between the North Carolina Public Service Company and Watson Milling Company, at or near Greensboro, N. C.

15. The schedule of rates under which the North Carolina Public Service Company sold and distributed electricity in the City of Greensboro prior to April 1, 1919.

16. The schedule of rates under which the North Carolina Public Service Company now sells and distributes electricity to the City of Greensboro.

Order for N. C. Public Service Company to Produce Certain Papers at the Trial.

[Filed June 9, 1921.]

[Title omitted.]

Upon reading the petition of the Southern Power Company praying that the North Carolina Public Service Company be required to have and produce upon the trial of this suit at Greensboro on Thursday June 16, 1921, certain contracts, papers and documents, described in said petition, it is ordered that said North Carolina Public Service Company have and produce upon the trial of this suit the contracts, papers and documents described and referred to in said petition or else show cause on said 16th day of June, 1921, if any it has, why it should not have and produce said contracts, papers and records upon said trial. A copy of this order together with
136 copy of said petition shall be served upon the plaintiff, North Carolina Public Service Company.

This 9th day of June, A. D. 1921. Jas. E. Boyd, United States Judge.

Motion of Plaintiffs for a Final Decree.

[Filed June 16, 1921.]

[Title omitted.]

Now comes the plaintiffs North Carolina Public Service Company, City of Greensboro and City of High Point, and move that the Court enter a final decree upon the pleadings, ordering and directing the

defendant to continue to furnish electric current and energy to the plaintiff North Carolina Public Service Company at Greensboro and High Point, as it is now doing; and further, that the decree provide that the current and energy shall be furnished at such rates and under such rules and regulations as the Corporation Commission of North Carolina shall fix and make in its order disposing of defendant's application now on file with the Commission to fix rates and regulations for service in North Carolina. A. L. Brooks, King, Sapp & King, Attorneys for North Carolina Public Service. Chas. A. Hines, Attorney for City of Greensboro. Dred Peacock, Attorney for City of High Point.

137

[Title omitted.]

The following and annexed is a narrative statement of the testimony of witnesses examined in the above-entitled suit, and also a copy of the exhibits introduced in evidence in said suit, which is herewith filed in the office of the Clerk of the United States District Court, for the Western District of North Carolina, for examination by the Southern Power Company, Appellee. A. L. Brooks, King, Sapp & King, Chas. A. Hines, Dred Peacock, Solicitors.

W. S. LEE, witness for defendant, being duly sworn, testified as follows:

I am Vice-President and Chief Engineer of the Southern Power Company, and have been such since its organization in 1915. I negotiated the contract between the Southern Power Company and the High Point Electric Power Company. This contract was executed by W. Gill Willie, who was President of the Southern Power Company at that time, and by the Secretary, R. B. Arrington. It was executed on behalf of the High Point Electric Company by Mr. Thompson as President and Mr. Richardson as Secretary. This is the original contract. Pursuant to the contract the service was rendered which was undertaken therein, and bills were rendered accordingly. Since the organization of the North Carolina Public Service Company, this contract has been continued with it as the successor of the High Point Electric Company. Service was rendered thereunder to N. C. Public Service Company, and bills rendered in accordance with the contract until term of the contract expired.

The contract was then offered in evidence, marked "Exhibit 1." Delivery under this contract of current was begun about 1906. There is a provision in the High Point contract whereby it is agreed that the High Point Electric Company shall dismantle its steam plant, and take all of its power from the Power Company. I did not have all of the negotiations about entering into the contract, but practically all of them. In order to explain this whole situation, will state, Mr. Richardson, who was Secretary and Treasurer of the High Point Company, took the matter up with the Southern Power Company. We had no lines north of Salisbury. We at that time did not contemplate building those lines. He wrote me sever

letters, and I had several conferences with him regarding this matter. I visited High Point and made an examination of his plant. His company started before that as a steam plant, and had some machines belonging to the City of High Point being driven off of its engines. Back in those days we had not developed the modern electrical apparatus that we have today, and he had two machines working in there on what we term direct current. That is not the current we sell. Direct current can only transmit power in a local zone, or short distance from the station, and he had contract with some of the industries around there driven from his steam plant which generated direct current and operated direct current motors in their plants. In addition to this, his station had one alternating current machine used for transmitting power and lights to a little greater distance. The capacity of the alternating current machine was about 200 Kw. He had two direct current machines of about the same capacity. They were serviceable and not so much out of date. They had a capacity which was limited to supplying power only near the plant. They did not carry the power a distance great enough to light the city. They could not be used to supply the current we were furnishing under this contract. Mr. Richardson wrote me on several
139 occasions, and had several conferences with me, and said they were at the point they would have to build a new steam plant.

Defendant then offered in evidence certain letters received from Mr. Richardson, and designated as "Defendant's Exhibits Nos. 2, 3, 4, 5, 6, 7, 8 and 9."

Mr. Richardson was Secretary and Treasurer and principal owner of the High Point Electric Company. Mr. Thompson was President. I never at any time, in conversation with Mr. Richardson, or by letter, nor to anyone else, suggested that he scrap his steam plant. The contract between the Southern Power Company and the Greensboro Electric Company, dated December 23rd, 1908, was executed on behalf of the Power Company by W. Gill Wiley as President and R. B. Arrington as Secretary, and on the part of the Greensboro Electric Company by John Kerr, President, and Z. V. Taylor as Secretary. I am familiar with the handwriting of Mr. Taylor. This is his handwriting and signature. The Power Company rendered the service obligated under the contract up to its expiration. The contract was made in December, 1908, but the transmission line had to be built from Salisbury up, and I do not think the service began until probably January, 1910, and their contract runs ten years after the service actually began. This contract was taken over by the North Carolina Public Service Company, and we carried it out and billed the N. C. Public Service Company for power under the terms of the contract.

The defendant offers in evidence said contract, marked "Exhibit No. 10."

The Southern Power Company does business in the City of Salisbury, furnishing power to cotton mills and to domestic power and to small power. It operates under a local franchise.

The franchise is offered in evidence, marked "Exhibit 11," dated April 8, 1919.

140 Defendant offers this testimony for the purpose of showing that the Southern Power Co. and the North Carolina Public Service Co. are both engaged in local distribution of Power in Salisbury, and that also after this competition arose in Salisbury that the Southern Power Co. was granted this franchise in April, 1919, and that up to that time the North Carolina Public Service Co. had been charging the people of Salisbury and Greensboro and High Point 12¢ kw. for electricity for lighting service which it was obtaining at 1¢ in Greensboro and 1.35 in High Point, and that when the Southern Power Co. entered into competition with the N. C. Public Service Co., at that point, the Public Service Co. reduced its rates from 12¢ to 9¢ in Salisbury, Greensboro and High Point.

Defendant offers in evidence schedule of rates charged by the N. C. Public Service Co. in the distribution of electricity for lighting purposes in the City of Greensboro, which went into effect prior to April 1, 1919, and produced by said N. C. Public Service Co. in response to notice served upon it by the Southern Power Co. to produce such schedule, marked "Exhibit No. 12."

Defendant also offers in evidence schedule of rates for electricity for lighting purposes in effect in the City of Greensboro by the N. C. Public Service Co. subsequent to May 1, 1919, produced by said N. C. Public Service Co. in response to notice of Southern Power Co. to produce said schedule, marked "Exhibit 13."

A kilowatt is a thousand watts, and a watt is a unit of electrical measurement. It is made up of two factors, the amount of current and pressure. Voltage is named for a man by the name of Volt, and is used to designate the pressure at which the current is moved, and the current or the amount flowing is named for a man by the name of Ampere. The product of the pressure and the current, or the product of the voltage and amperage gives a watt. Watt is also named for one of the scientists. A kilowatt is simply a term of 1,000 watts. A kilowatt is the capacity, for instance, if we have a maximum of 100 kilowatt-of capacity, it may not produce any power,

but if we ran for an hour at full load, it would produce 100
141 kilowatts. Just like a man might be one man power, and if

he was not working he would not produce anything, but if he worked for ten hours, he would produce ten hour man power. A kilowatt is a kilowatt which operates over an instrument of time for one hour. These schedules have been introduced in evidence, and the terms of the contract fixing the price are based upon so much a kilowatt in each *distance*. Electricity in almost every case is sold by the kilowatt. The difference between a kilowatt and horse power is, a kilowatt is 746 watts, equivalent to that in energy. A kilowatt is 1000 watts, therefore a kilowatt would be approximately one and one-third horse power. I have tables showing the amount of electricity generated and distributed by the Southern Power Company in North and South Carolina. The figures I have are made up to April 30, 1921, for 12 months ending at that time. Since these were made up we, perhaps, might have a month later, but I have only those figures. This table gives the total amount of power generated & distributed from other companies by the Southern Power Com-

pany, as well as the total amount distributed. For 12 months ending April 30, 1921, the Southern Power Company sold 595,916,911 kilowatt hours. They generated by water and steam and by purchase power during that same time 741,984,705 kwh. Of that amount there was generated by steam at four steam stations 1,375,500 kwh. Water power plants owned and leased by the Power Company generated 709,730,620 kwh. They purchased power from the Georgia Railway & Power Company of 30,253,585 kwh. They purchased from the Saluda & Anderson plant of the Southern Public Utilities Company at Saluda 32,000 kwh, and 593,000 at Anderson. This made the total purchase power 30,878,585 kwh. During the 12 months ending April 30, 1921, there was sold in South Carolina 221,247,377 kilowatt hours; there was sold in North Carolina for the same period 374,669,534 kwh. There was generated and purchased in South Carolina 611,945,805 kwh, and there was generated and purchased in North Carolina 130,038,900 kwh. We sold almost three times as much in North Carolina as we generated. We generated and purchased 741 odd million and sold 595 odd million. The difference between that was absorbed in loss on transmission and transformer. That is called the line and transformer loss.

142 This loss varies from about 18 to 20%. Line loss, which consists of about one-half the loss, depends entirely upon the length of the transmission. The transformer loss is about the same whether for a short or long transmission. Most of our plants and the larger ones are located in South Carolina on the Catawba River. They are leased by the Southern Power Company and operated by it under these leases. The Bridgewater plant is owned by the Western Carolina Power Company and leased to the Southern Power Company. The Southern Power Company owns one-third of the stock in it. The Southern Power Company has no plant on the Yadkin River. The Southern Power Company has been purchasing power from the Georgia Railway and Power Company. We are now receiving from that company at their Talulah Falls plant, and have been for five or six years. That contract, however, has got a cancellation clause in it, which either party can cancel in three years' time. That contract has been cancelled and will expire, I think, in about a year now. When we undertake to build a power plant or add an additional power plant to the system we, of course, estimate and design it as carefully as we can to determine just what output of power we will get from that station. At the same time we undertake to place contracts for that amount of power somewhere on the system. If we do not arrange for the sale of that, that plant will stand idle, and it will of course be very expensive to operate it on part load, that is pressure load. We cannot store alternating current electricity, therefore we must find a customer to take it up as it is generated, or it is an entire loss of that part of the investment that is not generating power. For that reason we try prior to the time we put the plant in service to make necessary contracts or secure customers that will take up the output of this plant when started, but back in our early days we neglected to do that sometimes, and the result was that we operated at quite a loss for several months before we could get a load for

the plant. It has been the custom of the company now for a number of years to secure a load by knowing definitely what it is, and by contracting for it, so that the plant could be put in full operation as soon as it is ready to run. If only one-half of the capacity of the plant is

being consumed, the balance goes to waste. The machines
143 automatically take just such load as is turned on by the consumer. The machines generate just so much electricity as is consumed by the customers. If we had more power than the plant is designed for, it would either lower our voltage or lower our speed and give inefficient service, and if it goes up to a point of overload, we have got to open the switches or take off the power, or we cannot serve the other customers. We mean by "dump power," power that is produced by excess water over the normal flow of the stream. For instance, what we term primary power is developed by the low water flow of the stream. We can develop that the year round. When we have an excess of water in the river we have available power during that high water time which we term dump power, because it is power beyond what was required to furnish customers customers as primary power. It is unused power to fill our contracts. We can contract for all our dump power. If you have contracts you can utilize that, otherwise it goes to waste.

Q. What are the conditions under which the Southern Power Company sells electricity to other public utility companies?

A. We have made contracts with a few public utility companies in which we agree to furnish them power for their requirements under terms of contract defining the different amounts.

Q. Does the Southern Power Company sell power to other public utility companies except under special contracts?

A. No, sir, unless you would term the contract with the N. C. Public Service Company. That is the only case we have.

I have the figures showing the increase in the consumption of electricity by the N. C. Public Service Company at Greensboro and High Point for the last ten years. The consumption of power by the N. C. Public Service Company at High Point, the service began in 1909, but that there was only a small amount delivered that year. In 1910 we sold them 1,424,300 kwh. In 1911, 1,577,400. In 1912, 1,837,300. In 1913, 2,093,300. In 1914, 2,443,900. In 1915, 2,702,000. In 1916, 3,605,900. In 1917, 4,342,600. In 1918, 5,418,132. In 1919, 5,298,700. That was the years in which our contract ran, and we began with about one and one-half million kwh., and at the end of the contract we had reached 5,300,000 approximately. After that in 1920 they consumed 6,600,400
144 kilowatt hours. Greensboro's consumption in 1910 was 2,111,910 kwh; in 1911, 3,032,400; in 1912, 3,267,430; in 1913, 4,112,410; in 1914, 4,419,870; in 1915, 5,024,340; in 1916, 5,472,240; in 1917, 5,977,400; in 1918, 5,793,700; in 1919, 6,623,400. After the contract and extension of it through a letter in 1920, we supplied them 8,270,600. In 1919 we supplied Greensboro 6,623,000. In 1920 they were supplied 8,270,000. I have not figured it, but it was 30% or better increase for that one year.

Q. Did you have any negotiations with the representatives of the North Carolina Public Service Co. with reference to the renewals of the special contracts for sale of electricity for that company at Greensboro and High Point by the Southern Power Co. prior to the expiration of those contracts and subsequent to the time that the North Carolina Public Service Co. bought out the companies that formerly did business with those two towns, and with which you originally made those contracts?

A. Yes, I had negotiations several times with them.

Negotiations with Mr. Hole, Mr. Deal, with Mr. Clark, and on one occasion there was present at the conference a gentleman from Philadelphia—Mr. Cone. Mr. Taylor was never in the conference regarding the North Carolina Public Service Co. negotiations. Mr. Taylor made the contract with me for the Greensboro Electric Co. before the N. C. Public Service Co. was formed. I think there was some correspondence about it, but it was largely a matter of conference. Three or four years before the expiration of the contract of the North Carolina Public Service Company at Salisbury, High Point and Greensboro, I had conferences with the gentlemen I have just mentioned, and I might add another one I forgot at the moment, Dr. McLelland of Philadelphia. The question came up as to renewing these contracts at their expiration, and these gentlemen met, or some of them did, at different times at my office at Charlotte and were discussing the question of renewing it, and what rates we would want for this service. We named them a rate at the early stages of this, and they said that rate was too high. This was after the organization of the Southern Public Utilities Company. The rate we first named them was the same rate that the Southern Utilities

Company was paying under its contract at that time. The
145 rate that the Southern Public Utilities Company was paying at that time, and is still paying on the contracts made prior to that time is the rate beginning at 9 cts. and going down to a minimum of 1.1¢ per kwh, but after we discussed that they took the position that they could make their power cheaper by building a steam plant, and discussed with me on two or three occasions the question of building a steam plant between Salisbury and Greensboro somewhere, and supplying power for all their plants. This went on for a while, and afterwards they stated that they would probably build a water power plant. This water power plant they proposed to build was on the Yadkin River, between Salisbury and Greensboro, and transmitted power to their three plants or three cities from that point. I might add that that conference also had another gentlemen I failed to mention, Mr. J. P. Clark, who was formerly with this Company. That was in 1916. The representatives of the North Carolina Public Service Company exhibited the new plans and specifications of the proposed water power company, they proposed to build at High Rock. Mr. Deal, Vice-President and General Manager of the Company did this. I had a few conferences with Mr. Deal, and he sent me copy of the report that Mr. Clark and his associates had made covering the High Rock development. This is the letter.

Defendant offered in evidence letter of E. C. Deal, Vice-President and General Manager of the N. C. Public Service Co., to W. S. Lee, dated July 28, 1916, marked "Defendant's Exhibit 14."

I have in my possession the report which had been sent me.

By Mr. Brooks:

Q. Don't you know that was the personal property of Mr. Clark, that development which he was trying to get up?

A. Mr. Clark told me he owned part of this site.

Q. And was trying to sell it?

A. The report speaks for itself; that is all I know about it.

Mr. Clark was an engineer and was interested and worked for the Public Service Co. for quite awhile, and afterwards worked
146 for the Piedmont & Northern Railway Co., one of our interests. I knew him for a number of years.

Q. What position did Mr. Clark hold with the North Carolina Public Service Company at that time?

A. I could not answer that. He had some important position prior to that, but whether at that time I do not know.

Q. You say, as you understood, Mr. Clark held title to the High Rock development?

A. When Mr. Clark was employed by the North Carolina Public Service Co. he discussed this property, I don't know whether it was personal or not.

Q. Or for the North Carolina Public Service Co.?

A. I do not know, I rather think it was for Mr. Clark personally. I don't know.

He did not try to sell it to the Southern Power Co. Mr. Deal, I think, succeeded Mr. Clark as Vice-President and General Manager of the Company. I know he was Vice-President and General Manager of the North Carolina Public Service Company for some time. He stated that the North Carolina Public Service Company was contemplating a hydro-electric development. He discussed the matter with me, and sent Mr. Clark's report about this property.

Defendant offers in evidence report referred to marked "Defendant's Exhibit No. 15."

This report, as I stated before, was given by Mr. E. C. Deal. We had had several discussions regarding the North Carolina Public Service Co. building a hydro-electric power plant, and he told me they were considering building this plant, and sent this report to me, and asked that I look over same. It is rather long, but I will only read a few abstracts from it. It is made to J. Peyton Clark, 43 Cedar St., New York City, and signed by the Fargo Engineering Co. of Jackson, Mich. The first part of this says: "This capacity would give you 14,200,000 kw. primary power in any year and with water to spare. This is considerably more than the present requirements of the N. C. Public Service Co. If physical connection is made with the Southern Power Co. transmission lines at Salisbury, it will be in the wrong direction if the North Carolina Public Service

147 Company desires to take over the operation of same and extend to the High Point, Greensboro and Winston-Salem districts."

I turn to page 3 of the report. The following statistics were furnished through the N. C. Public Service Co.: "The contracts of the N. C. Public Service Co. are three in number and all expire about 1919. These contracts limit the maximum demand to 3,000 kw. for Greensboro, 420 for Salisbury, and 1,200 kw. for High Point. The contracts carry a rate of 1.1c per kwh. on all current purchased except a portion at 1.35c per kw. at High Point. Under the conditions of these contracts the N. C. Public Service Co. is limited to obtaining of lighting and small power business. Except by special permission they are not allowed to serve large power consumers. On account of the probably electric railway extensions, and the fact that the N. C. Public Service Co. is reaching a point where its ability to take on new business will necessitate a new contract with the Southern Power Co. with a probable rate increase or an enlargement of the N. C. Public Service Co.'s own steam plant makes the High Rock development an interesting proposition, especially so if proper arrangements can be made with the Southern Power Co. to take the output above the requirements of the N. C. Public Service Co. until the Public Service Co. shall need the output."

Q. It is alleged in the bill of complaint that the Southern Power Company has a monopoly of the hydro-electric power in Piedmont, North Carolina. Will you state the amount of power the Southern Power Co. owns and controls in Piedmont North Carolina?

A. The Southern Power Co. with its affiliated interests has two developments in North Carolina, one at Lookout Shoals of about 33,000 hp. and one at Bridgewater of about 27,000 hp., making a total of about 60,000 horsepower. According to the geological survey and government reports there is undeveloped in the State of North Carolina about 1,095,000 horsepower. I think the estimates are low and I believe there is undeveloped in the state two million horsepower.

Q. The Yadkin River lies between the territory served by the N. C. Public Service Co. and the Catawba River upon which are
148 largely located the plants of the Southern Power Co. Do you know anything about the undeveloped power in the Yadkin River?

Plaintiff objects. Overruled.
Plaintiff excepts.

A. The Yadkin River rises in Western North Carolina in a very similar territory and altitude that the Catawba River rises. It falls of course from that elevation to the sea and has approximately the same kind of fall the Catawba River has, and just as much or more power can be developed on the Yadkin River as can on the Catawba River.

Q. This High Rock development they told you they were going to make is on the Yadkin River?

A. Yes, it is down below the Southern Railway crossing near Salisbury.

Q. Has that ever been developed?

A. No, sir, it has not been developed.

Q. Is that capable of being developed?

A. Yes, that is capable of being developed and is now owned by the Tallahassee Power Co., a subsidiary of the Aluminum Company of America, and they have offered to develop it and sell us power within the last 60 days.

Q. In addition to the Yadkin River, state whether the Roanoke River is nearer to the Greensboro and High Point market than the Catawba?

A. The power we are transmitting along here is a longer transmission than would be from here to Roanoke River.

Q. Are you familiar with the capabilities of the Roanoke River with respect to the development of power?

A. Yes, I have made the examination and surveys of the Eaton Falls and the Eagle Falls of the Roanoke River. They have two very fine power sites and the river is very much larger than either the Catawba or the Yadkin.

Q. Are those sites on the Roanoke River developed?

A. No, sir, they are not developed.

Q. Are they in North Carolina?

A. Yes, one part of the pond would be in Virginia and part in North Carolina. The other is entirely in North Carolina.

Q. Are you familiar with the power which the Aluminum Company has developed at Badin?

A. Yes.

149 Q. How much power have they developed at Badin?

A. They have one station with 54,000 kilowatts installed and another with 14,000.

Q. Are they using all the power which they developed there?

A. No, sir, they are using very little at present.

Q. Have they power for sale over there?

A. Yes, sir.

Q. How much?

A. I do not know exactly how much they have for sale. They are negotiating a contract with the Southern Power Co. now for about 25,000 kilowatts.

Q. How far is that from Greensboro?

A. Approximately 70 miles I would say.

Q. That power is nearer to the N. C. Public Service Co. than any power which the Southern Power Co. has, is it not?

A. Yes, sir.

Q. Did the representatives of the N. C. Public Service Co. ever tell you that they proposed to build a steam plant and generate power from steam?

A. Yes.

Q. Tell all about what they told you.

A. It would be hard to do as we had the matter under discussion several times. They first suggested building a plant near Greensboro for Greensboro service and at one time discussed with

us the advisability of transmitting that power over our lines to the other points and further discussed the facts of building their own lines between Greensboro and Salisbury and picking up High Point in between.

Q. Did they state to you why they were contemplating the construction of a steam plant?

A. They told me they could make power by steam cheaper than we could sell it to them.

Q. What were you offering to sell it to them at?

A. We were offering to sell it to them at a rate of about 9c for the first small amount down to 1.10, the rate we were then furnishing the Southern Public Utilities or any other customer of that class.

Q. Are there any electric companies operating in North Carolina which generate their power by steam?

A. Yes, a good many companies, that is commercial and factories and municipalities or private corporations.

Q. Public Service Companies distributing power under 150 local franchise?

A. Yes, Wilmington, Durham and a good many others. I happen to know those two.

Q. Has the Southern Power Co. sold all the power which it is capable of generating or acquiring at this time?

Plaintiff objects. Overruled.

Plaintiff excepts.

A. The Southern Power Co. has not been able to sell any power since the fall of 1919. We had a very sharp demand for power during the latter part of 1919, in fact made a great many contracts about that time. We began to be disturbed about the possibility of supplying them all. We checked up on our generation and sales, although we had at that time two new plants practically just coming in, we came to the conclusion it was not safe to sell any more power. Since that time we discontinued selling power to any one except where perhaps some company had some unused power that they increased.

Q. To what extent have you now on file applications for power which you are unable to fill?

A. We probably have on file applications for 25 to 30 thousand horsepower that we cannot make a contract for and cannot serve if we had them, not with the capacity of our present plants. We have also 10 or 15 cotton mills whose contracts have expired and we are now carrying them on a temporary contract subject to cut-off when we have not got the power to run them.

Q. You say about December, 1919, that you had to stop the sale of power. State whether prior to that time you were contemplating the construction of any new developments?

A. We stopped the sale of this Power a little earlier than December. We then took up the question of building additional plants and began the construction of the power plants in December, 1919.

Q. Where were those plants?

A. One to be No. 2 power house at Great Falls and the other the lower Mt. Holly plant near Mt. Holly.

Q. Did you proceed with the construction of these plants?

A. No, we became engaged in controversy as to power service and discontinued those plants and removed the force.

151 Q. Was it the litigation in this same case?

A. Yes, the litigation in this same case, only in another Court. The Salisbury Court.

Q. Why did that deter you from continuing the construction of your plants?

Plaintiff objects. Overruled.

Plaintiff excepts.

A. The Southern Power Co. has been in the field for about 15 years. We have gone through the ups and downs of business, flood and war conditions, but we had maintained a very high standing among our customers and our contracts and obligations. We were met here with an attack on our rates, our service and discrimination and that of course affected our ability to get money or to carry on this development and we have been standing practically ever since waiting and hoping that this matter would be settled some way so that we should know just what were our duties and obligations and how to proceed.

Q. If it should be established as the law that other public service companies can make ultimate demand upon the Southern Power Co. for the power which it generates and sells that power in competition with the Southern Power Co., can the Southern Power Co. secure the necessary capital to enable it to continue its business?

Plaintiff objects. Overruled.

Plaintiff excepts.

Q. It is very necessary that in laying out your transmission system and building your plants, that you know what power you will serve. If any company now formed or hereafter formed can come in the field and force you to deliver any amount of power whatever to them it would make it impossible to maintain a proper service, it would make it too costly, it would destroy the service that we have worked so long to establish, and that of course will prevent us from getting additional capital to build these extensions when we do not know how much is to be used, or when it is to be used.

Q. When you say you do not know when it is to be used
152 or how much is to be used, you mean how much of your electricity is to be used?

A. Any company having a right to demand an unlimited amount of power cannot be properly served by a power company because if it did it would have to stand there with unnecessary investments to be ready to serve what might come along, and it might never be there.

Q. Under those conditions could you make any contract to sell power to your customers directly?

A. We are exactly in that situation today, what we cannot make commitments, yet this particular company is increasing its load faster than it ever has in its history, and plants we have had contracts with that have expired we are going to have to cut off the first time water goes down and we cannot pull it, in order to give this company the power if its stays on the line.

Q. At the expiration of the contracts which you had with the North Carolina Public Service Co. I believe the Southern Power Company, wrote them the letters attached to their complaint which have been read here in evidence?

A. Yes, sir.

Q. Offering to sell them dump power at six mill for 12 months when you had dump power, and hydro-electric power when you did not have it. Under what conditions and for what purpose did you make that offer to the N. C. Public Service Co.?

Plaintiff objects, as the letters speak for themselves. Overruled. Plaintiff excepts.

Q. Under what circumstances were those letters written to the N. C. Public Service Co.,

A. Their contract had expired, we had no contract with them, and it has never been the intention of this Company to discommode anybody when they could help it and we thought we were doing a decent thing to try and help them out until they could get power from elsewhere and we wrote them this letter stating that we would use our utmost endeavors to supply them this power and if we did not have power with our excess water we would put at their command our steam stations at actually what it cost to produce it. It was not our desire to discommode their customers or themselves.

153 Q. Could they have built a steam plant or enlarged their present steam plant within that period so as to supply their needs.

A. Yes, sir.

Q. Did they do that.

A. I do not thing so, I have never heard anything of it.

Q. Did the Southern Power Co., upon its part comply with the terms and conditions of that letter with reference to letting them have dump power when you had it, and generating it by steam when they could not give dump power,

A. We did. We furnished them this dump power and whenever we could not furnish dump power we furnished it from our auxiliary or supplementary steam plants.

Q. What price did you charge for dump power?

A. Six mills.

Q. When you generated by steam did you bill them the cost of it?

A. Yes, the part we had to furnish by steam we furnished at the actual cost of producing that steam.

Q. Were those bills in excess of six mills?

A. Yes, very much in excess.

Q. Did they pay those bills for the steam?

A. They paid the bills during the year 1920 for the steam and for the dump power.

Q. Since the expiration of that letter, which expired Jan. 1st, during the present year have you been furnishing them power at Greensboro and High Point?

A. Yes, sir.

Q. Have they paid you anything for power during 1921?

A. Since the expiration of this letter contract in January, we have been billing them for power at the rate that we have on file with the Corporation Commission now.

Q. Is that the only rate you have?

A. That is the rate we have today and they have tendered us their checks for the same amount of energy at six mills. We have returned those checks and as we stand today we have received no money at all for the power since January, 1921.

Q. How much do they owe you for power furnished to them during the year 1921?

A. They owe us approximately for power furnished in 1921, seventy-five to eighty thousand dollars.

Q. At what rate are they becoming indebted to you each 154 month?

A. They are becoming indebted to the company at about sixteen or seventeen thousand dollars per month, I might say based on the rate we now have in existence on file at the Corporation Commission.

Q. Was the power you furnished them during 1921 dump power?

A. No, sir.

Q. Was any of that power generated by steam?

A. Very little of it generated by steam but a great deal generated by stored water which is not dump power.

Q. Where does that stored water come from?

A. It comes from our bridgewater reservoir between Morganton and Marion.

Q. The Southern Power Co. has that reservoir leased from the Western Carolina Power Co.?

A. Yes, sir.

Q. That is what that reservoir was built for?

A. Yes, for producing power and for storing water to assist the other plants.

Q. Is the rental which the Southern Power Co. pays to the Western Carolina Power Co. based upon the amount of power which the power company acquires from this Bridgewater plant?

A. It is, but a generated amount which they shall use.

Q. What is that rental?

A. One cent per kilowatt hour with a minimum amount of \$500,000 worth of power.

Q. The Southern Power Company has to pay the Western Carolina Power Co. a minimum of \$500,000 or 1c per kw. hr. for all power used?

A. Yes; or they might have a wet year and they would not have any income.

Q. Who stands the expense of the operation of that plant?

A. The Southern Power Company.

Q. It is alleged in the bill of complaint in this case that J. B. Duke is one of the officers of the Southern Railway Co. and one of its principal stockholders and that he is also interested in cotton mills in the Piedmont section of North and South Carolina, and that because of this dual interest which Duke has that the Southern Power Co., in fixing the rates with which it serves cotton mills, discriminated in their favor. I believe Mr. Duke is a stockholder and President of the Southern Railway Company?

A. Yes, sir.

155 Q. And one of the principal owners of that company?

A. He is.

Q. Do you know to what extent Mr. Duke is interested in cotton mills in Piedmont section of North Carolina?

A. I know to some extent; I do not know that I know all of them.

Q. So far as you do know will you state to the Court what his interest in cotton mills is?

A. Mr. Duke has an interest in a few of the cotton mills that the Southern Power Co. drives but his interest in most of them is comparatively small considering the value of the property—I mean the total amount of stock in it. I do not suppose Mr. Duke has an interest in 5% of the cotton mills that the Southern Power Co. drives.

Q. That is, 5% of the number of mills, or the spindleage?

A. 5% of the number of mills or the spindleage either.

Q. Does the Southern Power Co. drive all the mills that Mr. Duke is interested in?

A. It does not.

Q. How many is he interested in that the Southern Power Co. does not drive?

A. I cannot answer that. I happen to know of the Cooleemee Mills, or the one at Duke or Mayodan.

Q. Has the fact that Mr. Duke has an interest in cotton mills had any effect or control with respect to the rate which the Southern Power Co. charges mills for services rendered?

A. Absolutely none whatever.

Q. Who has ordinarily fixed the rate which the Southern Power Co. charged cotton mills?

A. The rate has been fixed by conferences of employees and officials of the Power Co., and whenever the rate was established it applied to every customer or cotton mill at that time, irrespective of who owned them.

Q. Has your rate for cotton mills been lower than the rate which you offered to the N. C. Public Service Co.?

A. Our rate to cotton mills is lower than any company in which they retail power and take a varying load.

Q. Why is it lower?

A. A good many reasons, principally that a cotton mill contracts for a certain amount of power, they use that amount of power throughout the entire length of the contract, while a public utility or municipality, take the growth of their business in town and in

ordinary conditions double that power in about five to seven years, and a cotton mill remains the same. The cotton mill is not as expensive service to keep up, due to the fact that they operate about 54 or 55 hours a week and we have off hours we can repair the lines or repair the sub-station we do not have near as much substation or switching apparatus for cotton mill service as we do for lighting or high class service like a retail distributing company. There are a good many other reasons.

Q. It is further alleged in the bill of complaint that Mr. Duke is also interested in the Southern Public Utilities Co., and that that fact has caused you to discriminate in favor of that company. Is Mr. Duke interested in the Southern Public Utilities Company?

A. Yes, sir, he is interested in them. I do not think he has very large holding now, but he has had considerable interest.

Q. That is regarded as one of the Duke companies?

A. Absolutely, and his advice and suggestions take effect in that company the same as the others.

Q. When was the Southern Public Utilities Company organized?

A. I think about 1913.

Q. I believe shortly after its organization the Southern Power Co. made it a contract to sell it power for the prosecution of its business?

A. Yes, sir.

Q. What was the term of that contract?

Plaintiff objects as the contract is the best evidence.

Q. Has that contract ever been executed by the Southern Power Company?

A. No, sir, it has not.

Q. Was it executed by the Southern Public Utilities Company?

A. Yes, sir.

Q. Have you been working under it?

A. Yes, we have been working under it since the company was formed.

Q. What rate have you been charging the Southern Public Utilities Company?

A. There were contracts prepared for every town, several of them, I don't know exactly the number, but they were all the same rate that were in existence at that time, and that rate begins at 9c kwh. and goes down to a minimum of 1.1c.

Q. Is that the rate which applies to the power sold at Reidsville?

A. No. They acquired Reidsville some time afterwards. In the meantime we decided to raise the public utility rate one mill
157 on the scale and the Reidsville rate is 9.1 to 1.2c.

Since its organization the Southern Public Utilities Company has at all times paid for the power used except at Reidsville from 9c to 1.1c, and at Reidsville from 9.1 to 1.2c. From 1914 to the expiration of the Greensboro contract the price paid by the N. C. Public Service Co. was a straight rate of 1.1. The Greensboro Contract has always been cheaper than the Southern Public Utilities

contract. The North Carolina Public Service Co. paid at Salisbury 1.1, and that was the lowest rate the Southern Public Utilities has ever been able to get, and the average rate is higher. I cannot give an idea of the average the Southern Public Utilities would have to pay under the schedule referred to. I cannot offhand. It was based on every town and there are perhaps 15 contracts of different consumption on a sliding scale. That sliding scale of rates is applied separately in each town in which you sell power to the Southern Public Utilities Company.

Q. Sometimes before the expiration of the Salisbury contract did you have negotiations with the N. C. Public Service Co. for the renewal of the contract with them?

A. Yes, we had several conferences with them.

Q. Did any of these negotiations take place before you increased the rate to the Southern Public Utilities Co. which they now pay at Reidsville?

A. The active negotiations took place after we had put the rate in which applies to Reidsville. Before that was the time they were discussing the building of steam plants and water power plants, but after we had increased this rate 1/10th of a cent they took up the matter with us and then they contended they should have the rate which the Southern Public Utilities had. We offered them the rate which we were then charging the Southern Public Utilities at Reidsville and every other consumer of the same service, and they objected to that rate.

Q. Did you ever offer them the old rate which ran from 9.1 to 1.2?

A. Yes, we offered them that when they were discussing the question of a steam plant and water power plant.

Q. That was before you increased to 9.1 to 1.2?

A. Yes.

Q. After you increased it in the negotiations which you had with them, there was the rate you offered them?

A. Yes, sir, whenever our rate was changed for any service throughout the history of this company that rate applied to all business that came after that, made no difference what particular kind of business it was. We always had one rate in existence for a particular service at one time.

Q. Did the fact that Mr. Duke was in both the Southern Power Co., and the Southern Public Utilities Co. have any effect upon the rate you made the Southern Public Utilities Co.?

A. Absolutely none.

The Piedmont & Northern Railway Co. was constructed about 1911. The Power Company made a rate to it of 1.2 per kwh for day power, and 6/10 of a cent per kwh for night power, with the endeavor to try to get them to build up a night load and haul their freight at night when we had excess power. Later on that contract has been changed. I could not give you the date from memory, making the day rate 1c per kwh. and the night rate 8/10 of a cent per kwh. That is what we are charging them at present, and each year we have to submit a bid on account of the Interstate Commerce

Commission's ruling to that company for that power. We have continued to submit a bid of a contract we had with them of 8/10 night and 1c day. At one period we charged them a straight 1c kwh. The Piedmont and Northern Railway is a high speed electric railway that handles freight and passengers. They handle freight just as other roads do, except that they use electric locomotives. It has about 30 miles of main line in North Carolina between Charlotte and Gastonia, and has about 125 miles of main line in South Carolina between Spartanburg and Greenwood and Abderston, S. C. It does a considerable business; it is quite a large company, and in making that contract with them it is not a similar contract to an ordinary service. They operate this road with direct current motors, and they use their own apparatus in changing this current from alternating to direct current. Furthermore, we did not reach part of this railroad system, and they built about 60 miles of high tension transmission lines on their own substations, and this contract is not on a parity with the service we are supplying elsewhere. This railroad has built for itself six substations. We deliver current

159 to them at 2,300 volts, through sub-stations which they have already established. They transmitted from our lines to their sub-stations at approximately 50,000 volts. They installed their own transformers and reduced to the voltage they desired. They have in these stations motor generation sets, one side an alternating current motor, and the other a direct current generator, they make their own current by driving it with a motor from our power.

The Southern Power Company pays four mills per kwh. to the following generating companies: Great Falls Power Co., at Great Falls, the Wateree Power Co., and the Wateree Electric Co. in South Carolina. At Bridgewater they pay the Western Carolina Power Co. one cent. That is the station charge at generation voltage. It has to be stepped up, transmitted and stepped down for service. The Southern Power Company bears the expense of operating those plants. It leases the plants from the companies named. The rental is calculated upon a basis of 4 mills per kwh for current the Southern Power Co. generates from those plants at the generating station.

Q. Over how many miles of transmission lines does that electricity have to be transmitted to Greensboro?

A. It would depend on what plant it came from. As a matter of fact all the power is pumped into one system and I could not tell you what plant would deliver power here. The bulk of the power that comes here comes about 160 miles, or possibly more for the average.

Q. If it came from these plants at which you pay four mills per kwh, about how many miles would it have to travel?

A. An average of 160 to 170 miles.

The current for which we pay 4 mills is generated in some cases at 2,300, and some 6,600 volts, and then it is stepped up by the Southern Power Co. and generated at 100,000 or 50,000 volts. The distance is so great that if you did not step it up to high voltage you could not transmit the power such distance. It comes into Greensboro on the 100,000 voltage line, and is there stepped down to 2,300

or 2,400 volts and delivered to the N. C. Public Service Co. The Southern Power Co. stands the cost of the process of stepping it up, transmitting it and stepping it down. I have already testified that the line loss is about 10 to 20%.

160 Cross-examination for plaintiff:

The Southern Power Company was organized in 1905. The first company organized by the Duke interests, as you speak of it, was the Southern Power Co. in 1915. Prior to that time Dr. Wiley had organized the Catawba Power Co., a South Carolina corporation, with about 7 or 8,000 kilowatt plant at Rock Hill, and was built at the time the Southern Power Co. was organized. Mr. Duke was not interested in that Company until the organization of the Southern Power Co. Mr. Duke was not interested in the construction company, or the company that purchased some water rights before that. The Catawba Power Co. was a construction company. This company purchased certain property from another Company and paid four million dollars. That was the American Development Co., which owned water rights at Great Falls on which some plants and parts of plants have been built. I do not know who owned the Development Co., but Mr. Duke was interested in it. That was before my time. That construction company was turned into the Southern Power Co. and four million dollars of stock was issued for that. Mr. Duke became President of the Southern Power Co. several years after that. Dr. Wiley was President. He was largely interested in it. The capital stock of the Southern Power Co. in 1905 was four million dollars of common stock and two million dollars of preferred stock. From time to time as we built plants that preferred stock was increased to six millions, and that remained at six millions until quite recently. I believe it is that yet. The first water power the Southern Power Co. developed was at Great Falls, station at Great Falls, S. C., in which it installed 32,000 horsepower. That was begun in 1905 and completed in 1906. The next plant the Southern Power Co. developed was the Rocky Creek station, and about the same time it began the construction of the Ninety-Nine Island station on Broad River. The rated horsepower of the Rocky Creek station is the same as the Great Falls, which is 32,000 horsepower. The capacity of the Ninety-Nine Island station is 24,000 horsepower. In 1910 the Southern Power Co. executed a mortgage for ten million dollars and sold three million of bonds. Others were sold later from time to time, and the outstanding bonds now are seven million dollars. Mr. Duke and his associates organized thereafter the Great Falls Power Co. This was organized in 1910, and they purchased the Great Falls, Rocky Creek and Ninety-Nine Island station from the Southern Power Co., and they paid for that about six million dollars of common and about six million dollars of preferred stock. They purchased that property subject to the mortgage of the Southern Power Co., and the Great Falls Power Co. entered into a contract with the Southern Power Co. to purchase power generated there. The contract price was about 3.6 or 3.8 mills per

wkh. I do not think this contract was for 40 or 50 years. I am not clear on that, however. The Catawba Power Co. was purchased by the Southern Power Co., and is owned entirely by it. It owns the Catawba Power Co. plant, about six miles from Rock Hill, S. C. The Southern Power Co. owns all the stock of that.

Q. The same interest organized another corporation known as the Catawba Mfg. Co.?

A. No, sir, that is an old company they purchased, it is known as the Water Power and Cotton Mill, located about ten miles west of Charlotte.

Q. What is the developed horsepower there?

A. It has none. It has a cotton mill that had been on the site about 60 years and the flood of 1910 washed away the entire thing.

That is a South Carolina corporation and owns the Wateree station on the Wateree river near Camden, S. C. The Southern Power Company does not own and never did own that stock. That stock is owned by the Wateree Electric Co. The Wateree Electric Co. is owned by the same interests as the Southern Power Co. At the time the Salisbury suit was instituted the Southern Power Co. had not filed with the Corporation Commission of North Carolina an application asking them to fix rates. This application was filed in 1920. I cannot give from memory the date. We had undertaken to file it for several months, and did not have an opportunity on account of the Commission being very busy. After the petition was filed with the Corporation Commission to fix rates 85% of the stock of the Southern Power Co. was sold to the Wateree Electric Co.

162 The Southern Power Co. got for the four million dollars of stock it bought from the American Development Co. water rights at Great Falls, Rocky Creek, Fishing Creek, and part of Wateree, not the entire amount, but practically the entire amount of land and flowage rights of those companies. They were not developed.

Q. It is alleged in the bill and you have been asked here and complaint has been made that you have not submitted your business to the regulation of the Corporation Commission of North Carolina. I will ask you if you did not make this statement before the Corporation Commission: "Last year the same bill was before the South Carolina legislature. It was introduced by the same party, and was very earnestly sought by all the power companies in South Carolina except the Southern Power Co." (That was a bill to put them under the jurisdiction of the Corporation Commission of South Carolina.) "I went there myself. I was there at that particular meeting. I took the stand, and my company did, that we have taken ever since we have been in this hydro-electric business, that a contract between a power company and a cotton mill was not a matter in which the Commission should have authority, that the cotton mill could develop its own power and were independent of buying power. On the other hand, where we were serving the public or a public utility or city under a franchise, that we should get under the bill, that the man down the street that had a light bill of \$1.50 could not get his power elsewhere, and that the Commission should have the authority

to see that the Company that had that franchise extended its system to take care of him, but in the case of the mill with 5,000 horsepower that the Commission could not require the Power Company to build plants and transmit power to him, and therefore I thought it was a private contract and should be so treated. We took the same stand before your Commission here by letter when we filed our rates, and it is my opinion today that the Southern Power Co. ought to carry out every contract it has with the mills in North and South Carolina, and I do not think the Commission should handle these contracts, because I think they are private contracts. That bill is going to pass this year. They are going to put us under just as you did (referring to me), and I guess we will have to go before the Commission then." That is what you said?

A. Read the first part of that question you asked me.

Q. I will show it to you. Here is what you answered (showing record).

A. I stated exactly what was in that record, but I wanted to know the beginning of the question. I stated what is in that record before the Corporation Commission, but Mr. Brooks asked me some prelude to that which I would like to have read.

Q. Then you did not go before the Corporation Commission and submit yourself to until after the N. C. Public Service Co. had brought the suit against the Company in Salisbury, and also brought the suit against you here in Greensboro?

A. The statement you have read from that record.

Q. I ask you if you did not do it until we brought both these suits?

A. I think that is correct. When the first Salisbury suit was brought there were certain decisions rendered by the Courts of the State which we were advised clearly put us under the Corporation Commission. We immediately began the study of the subject, and we then decided to go before the Corporation Commission and have our rate matter decided. We made an endeavor to get before that Commission several months before we did. We were told that they had a tax revaluation on hand, a session of the Legislature, and the Commission was going out West for a month and the result was that before our petition was actually filed it was in the fall of 1920. I have stated before that Commission just as he has read there, and that has been my idea about this thing until today I do not know what is right. I have been before a battery of 12 or 15 lawyers at a time, and I have not seen any two of them who could agree what it was, so I do not know, but I gave you my ideas and my reasons there as clearly as I could.

Q. At the session of the legislature of South Carolina before the last as you stated, you went before the legislature and succeeded in preventing a bill passing that would put your company under the control of the Commission of that State?

A. Yes, I stated approximately that. I did go down to Columbia at the session of the legislature, and this matter was brought up and prepared largely by some of the other power companies and

the Commission. The bill looked as if it would be passed.
164 At that time I believed that those contracts were private contracts, and I did not think it fair that we go down there and get this legislature to annul them and make a snubbing post out of that legislature to change those contracts without letting the owners of those plants be heard, and I so stated before the Senate Committee, and the bill did not pass.

Q. Before the North Carolina Corporation Commission you asked that the rates in all your outstanding contracts, some of them with six and eight years to run, both with cotton mills and municipalities and other public service companies,—that the rate be abrogated and the Commission fix a higher rate?

A. I do not know that we asked for that, but I have been advised that there can only be one just and equitable rate for this purpose. We asked the Commission to fix that rate.

That rate is perhaps over 30% higher than the average of all the rates we have. This rate was beginning at 1.4c and sliding down on cotton mill service. The rate we had in effect ranged all the way from 8/10 of a cent up to 1.2c. The last contract was made at 1.2c on sliding rate. The lowest rate we were asking cotton mills was one cent. We had a contract with the Spray mills, 40 miles north of here, at 8 mills for primary power up to 1.2c. At Salisbury after the contract had expired we figured out a rate for the N. C. Public Service Co. I think at about 1.88 or 1.89. That is the rate we are charging that company pending this litigation which is now on. They are paying it under protest, and we are still billing it. We have been doing this about 18 months. We bring that power through Salisbury and Greensboro and carry it further on and sell it under contract at 8 mills. In 1907 we made a contract with the Town of Concord to sell it current at 8 mills. It was not on the basis of kilowatt hours. It was a guaranteed amount of power. That contract extended up to 1917. At the same time that contract was running we were charging the N. C. Public Service Co. 11 mills, and at High Point we were charging 13.5 mills.

Q. Have you calculated how much the difference between what you are charging the N. C. Public Service Co. and have collected from them during the life of the contract,—the difference between 8 mills and the amount you charge them?

A. I have not.

165 Q. Doesn't it amount to about \$300,000 in discrimination you have collected?

A. I do not believe that, I do not know.

In 1913 we made a contract with the Southern Public Utilities Company to extend for thirty years. It was made for a fixed amount. The increase was not covered in it, as I recall it. It was 9c and a sliding scale down to a minimum of 11 mills. I think they have paid for a small amount at 9c. It did not amount to much on the consumption. The Reidsville contract was negotiated in perhaps 1917 or 1918. That contract stipulated for a minimum of 12 mills, starting with 9c a mill. About 1918, before these con-

tracts with the N. C. Public Service Co. had expired, Mr. Fox of our company took up with the North Carolina Public Service Co. the question of renewing their contracts for Greensboro, High Point and Salisbury. When we offered them a contract we stipulated in that contract that it should be for 10 years and at the 12 mill rate, the same rate being paid by Reidsville.

Q. You declined to allow them a contract at the rate the Southern Public Utilities Co. had with reference to Charlotte and Winston?

A. Yes, that is absolutely correct. After that was made with Charlotte and Winston-Salem this rate was increased one mill, and that was the rate we were offering power at that time, and we offered it to that company.

Q. On that proposition the N. C. Public Service Co. said it would not enter into a contract with you to pay you for current more than you were charging the Southern Public Utilities Co.?

A. That is right where we split, and here we are.

You did not want a contract but for 10 years. You might have gotten it for 30 years if you wanted it. On Jan. 8, 1920, my Company wrote a letter to the N. C. Public Service Co., or Mr. Hole, the letter known as Exhibit "A" attached to the bill in this case, dated Charlotte, N. C. It also wrote the letter known as Exhibit "B," attached to the bill, and received the reply also attached to the bill noted as Exhibit "C."

Q. During those negotiations about the contract, wasn't this submitted to your company, that they would sign the contracts if you would put in these stipulations: "It is understood that the sale of rates herein stipulated is made subject to any ruling of the court or corporation commission affecting rates"?

A. Mr. Fox, who was in charge of these negotiations, received a letter from Mr. Hewitt of High Point, in which was attached to that letter a little strip with those terms on it.

Q. And you declined to consent to that going in the contract?

A. Yes, we declined to sign. If it belonged in there it would be in there without writing, and we declined to put it in.

Q. In other words, you took the position you had a right to make a contract yourselves without regard to the courts or the commission?

A. No, sir, we never took that position in our lives. I told you my position and I stated it I thought pretty thoroughly.

Q. What is your company's position before the corporation commission with relation to the right of the corporation commission to fix the rates you shall sell to the North Carolina Public Service and other public utilities in North Carolina—whether or not you are willing for the corporation commission to fix the rates and concede that they have authority to fix the rates in relation to the public utility companies such as the North Carolina Public Service Co. in this state?

Defendant objects. Overruled.

Defendant excepts.

A. The company took no position at all on the matter you have stated.

Q. What is your company's position?

A. My company's position in regard to selling power to another company in the same business of selling it to customers at retail is that we should not and ought not to be required to sell them. If I am required to sell your company power to sell to somebody else to redistribute, you might go on and sell it to another man and he to another and he to another, so in the final analysis the public would not get that power at a proper price. If I am a public utility I think the public is interested in getting the service direct from me and at the cheapest price without having one or a dozen intermediaries to add increased price.

Q. And your position further is that you have the right
167 without regard to regulation or governmental control or control of the courts, to make your own terms of contract with relation to rates and service with other local public utility companies?

A. That is what we are here to ask this Court to tell us, whether we are right, or whether we are wrong. That is the question I am asking them to decide. My position is that if I sell this man, and he sells that one, and he sells another, and the public bought from him, that he is not getting the advantage of the public utility, and the only way for the public to enjoy my service is for them to get their power direct from me.

Q. Your contention is that there is no governmental control or control of the courts whereby your right to contract with other public utilities re-selling can be affected, and that is a matter between you and them?

A. Certainly, it is.

Q. You say that is so even though the public utilities offer you the same rate that you get for the same kind of current from other customers, that you cannot be required to furnish it?

A. I would say in any case if a public utility bought power from me and sold it through other hands to the public, that the public is entitled to demand service of me if I am a public utility but this intermediate party is not. Those are my ideas, and that is what I am asking the court to decide.

Q. Please state how many public service companies in North Carolina the Southern Power Co. has built its transmission lines up and connected with and is now engaged in furnishing current to in North Carolina, and please name them?

A. We have the Southern Public Utilities, the Piedmont Company at Burlington and we have a few others.

Q. You have one at Leaksville?

A. Yes, a small amount of power is sold to a private concern that delivers it near Spray, perhaps at Norwood, a small town that does the same thing, and one at Hillsboro.

Q. How many do you furnish, and name them, of local public utilities in South Carolina?

A. We have the Southern Public Utilities in South Carolina and the Lancaster Light & Power Co.

Q. Those are the only two?

A. I am not sure of that. I was trying to think. That is a very small part of our business, but we serve them. They all, however, have contracts and are working under contracts with this company.

Q. And some of them have a number of years to run?

A. Yes, the Public Utilities has several years, and several others.

Q. How many towns does the Southern Public Utilities Co., to whom you sell, re-sell in North Carolina?

A. Reidsville, China Grove, Winston-Salem, Charlotte, Belmont, Mt. Holly. I think that is all.

Q. How many in South Carolina and the names?

A. Greenville, Greer, Chester.

Q. Has the Southern Power Co. applied for a franchise in any of the towns in which the Southern Public Utilities Co. has a franchise and is selling current?

A. We have a limited franchise in some. I do not think we have a general franchise in any.

Q. Have you applied for a franchise in Charlotte, where your Home Office is?

A. We had a franchise originally, but that was turned over to the Southern Public Utilities Co.

Q. Have you applied for a franchise in Winston-Salem to give them the benefit of this direct cheap rate from the Southern Power Co.?

A. I do not think so.

Q. Have you applied for one in Reidsville?

A. No, sir.

Q. Have you applied for one in any of these towns where the Southern Public Utilities Co. is re-selling these municipalities?

A. I do not think we have.

Q. Why haven't you?

A. We have made contracts and they are serving the people.

Q. You have only applied in towns where your company did not own and control the company that had the franchise?

A. We only applied in Salisbury where we secured it, and put in a retail distribution of lights for the consumers and in Greensboro.

Q. That is the only ones you have applied for in either North or South Carolina?

A. I think that is correct.

Q. You did not apply for it in Salisbury until you were sued there?

A. That is correct.

Q. You did not apply for it in Greensboro until you were sued?

A. Yes.

As I stated, the Southern Power Co. generated and produced

742,892,000 kilowatts. It produces in the only plant it
169 owns, Lookout Shoals, of that amount I gave you 47,462,-
400 kilowatts. It produces in its steam plant 1,375,500
kilowatts. The Southern Power Co. originally owned the Great
Falls Power Co. That had about 86,000 horsepower. We sold
that to another corporation, and its stock has been sold, so that the
Wateree Electric Co. now owns the controlling stock in these other
corporations. It is a fact that the officers of these corporations from
whom we lease the power are substantially the same as the officers
of the Southern Power Co.

Q. Isn't it a fact that the directorate and power of control and
contract are so that you can change or alter the contracts and the
leases at the will of these parties?

A. Yes, that is practically true.

The Southern Power Co., before the building of the Bridgewater
plant, had a contract with some of these companies, I think for
3.2 mills. I am going from memory. The Company is purchas-
ing approximately 50% of its power under these leases on this
lease basis at 4 mills. Four mills plus upkeep and operation of
these stations.

The Southern Power Co. is engaged under contract in selling
current for distribution to the following municipalities in North
Carolina: Concord, Monroe, Mooresville, and may be others, to
re-sell to the municipalities, and they sell to the community. We
do not retail current in the sense of supplying lighting customers,
in any incorporated town in North or South Carolina except Salis-
bury. We have a customer in the City of Charlotte, the Robinson
Manufacturing Co., that is located in the city. It is a cotton mill,
and they applied to the Power Company for power, and we had
the Public Utilities to sell them at the same rate we sell the cotton
mills, and instead of our building a transmission line in there the
Public Utilities built a line and served this, and we paid them a
certain percentage of the price they got for that power for serving
them. We have never extended that privilege to any other cus-
tomer. We would be very glad to extend it to any customer rather
than spend the money ourselves. The nearest developed hydro-
electric property to Greensboro is at Whitney or Badin, I would

say about 70 miles distant. It costs anywhere from five to
170 fifteen thousand dollars a mile to build transmission lines
such as we have. During the last year it cost about eleven
or twelve thousand dollars a mile. The Badin people have no
transmission lines at present. They have lines 3 or 4 miles long
that extend to the town of Badin from the power plant. The line
that connects the Southern Power Company's line with Badin ex-
tends from Great Falls to Monroe on through Salisbury north to
here. We have a branch line from Albemarle to Badin. No other
power company owns transmission lines built and connected with
the Badin power except ourselves, unless you would speak of lines
connected with them through us, but none directly. The only
development east of here of electric properties is the Carolina Light
& Power Co. The nearest hydro-electric plant they have is Blewit

Falls, which would be 20 miles below the Badin plant. They have transmission lines, however, 10 miles east of Durham, which is about 65 miles from here. We have connected with them for a number of years, half way between Raleigh and Durham, and connected with them at Wateree station in South Carolina. There is another large hydro-electric development known as the Georgia Railway & Power Co. We connect with them at their Tallulah plant, and get a little over thirty million kilowatt a year from them. The Central Georgia Power Co. connects with them, and they connect with the Columbia Power Co. and the Tennessee Power Co. are building now to connect with it. Our lines connect with theirs, and theirs connect with the other companies mentioned, but all these connections are outside of North Carolina. There is no hydro-electric transmission lines or sub-stations at Salisbury except ours. There are no other hydro transmission lines or sub-stations at or near High Point except ours.

The Court: Do I understand that both of these companies have franchises in Salisbury?

Mr. Brooks: Yes, sir.

The Court: Where does the Public Service Co. get their power?

Mr. Brooks: We purchase it from them. That matter is in litigation.

The Court: Who sells the power to light the city itself?

Mr. Brooks: The Public Service Co.

The Southern Power Co. is also selling current to another concern in which it is interested, known as the Southern Electric Chemical Co. I do not know the rate. It is very low and only when we can spare it; it does not run all the time. We sell it at the dump power rate. I would say at about 3 mills. That is a plant that we built for electric chemical experimentation at Mt. Holly. As to that, I made the following statement before the Corporation Commission. "The Piedmont Electric Chemical Co. there is a company for the purpose of developing electrical chemical process for the manufacture of phosphoric acid to be used for fertilizer and other purposes, and it is organized for the same purpose of finding some way to use the great amount of seasonable power which is going to waste, and which we were unable to sell to the cotton mills or industries in the territory. This company began ten or twelve years ago. We have investigated this process, not only in America, but in Europe. We have acquired these processes and have continued to work on them except during the war when the government refused to let us have power for this purpose. The service we have supplied to the cotton mills in our territory is largely a day service. We have power that goes to waste for at least nine months in the year that we cannot sell or cannot develop properly for that period of time and it has been the judgment of our company and our officers, irrespective of any public duty, that we should try and develop that power and use it rather than let it go to waste."

Q. Later this question was asked; "To what extent do you have water going to waste during certain seasons of the year?"

"A. We waste during the year more water over our dams than we use for producing power."

A. Yes, that is floods and seasonal waste of water.

We will sell the N. C. Public Service Co. dump power, but it wants power the year round. We might have a great block of it at one time, and a few days afterwards have none, and about the time we started to cut off the supply, you would slap an injunction against us. It cannot be done practically. I do not believe we sell it to any of the public utilities for the reason we will offer to sell it to anybody that can use it, and can come off and furnish their own power
172 when we have not got it, but we cannot get them on the line and when we run out not be able to get them off the line.

We are selling under contract to the Cone Mills what we term a six months secondary power. We have classed it as dump power since that contract was made. We term that a six months secondary power and guarantee to furnish it for a certain length of time. Dump power we do not guarantee to furnish for any length of time, only to give it to the customer when we have it and when he can use it. We charge six mills per kilowatt hour. The cost to generate electricity by steam varies with the load or load factor we are operating on, and without the interest and depreciation it costs around, I would say a cent and a half to one and three-quarters, possibly two cents, to generate a light load. We estimate a steam plant in this zone costs about 2c. a kilowatt.

Q. If a steam plant was built last year or this year in Greensboro under the conditions then and now prevailing with the price of coal and the cost of freight, that would take care of the demands of Greensboro or the North Carolina Public Service Co. at Greensboro, how much would you say it would cost per kilowatt?

A. I think it would cost approximately 2c. per kilowatt.

The Southern Power Company's charter and certificate of incorporation contains the following provision:

"3rd. Objects for which the corporation is formed are to purchase, acquire, lease, manage, control and operate, and to sell, lease and dispose of to such person or corporation or corporations, and for such price or prices, and on such terms or conditions as to this corporation may seem proper, water, water rights, power privileges and appropriation for mining, milling, agriculture and other uses and purposes, and to develop, control and generally deal in and dispose of to such person or persons, corporation or corporations, and for such price or prices, and on such terms and conditions as to the corporation may seem proper, electrical and other power for the generation, distribution and supply of electricity for light, heat and power, and for any other uses and purposes for which the same are adapted."

The Southern Power Company is connected with and is
173 now selling hydro-electric current in North and South Carolina to approximately 300 cotton mills. About 70%, perhaps 75 to 80% of these mills are located in North Carolina. This current is sold to the mills for motive power and for lighting power incident to the use of that motive power. I would not say that it was

sold for public hauls at all. The mills have certain hauls they keep us as a part of their property, and they use it for lighting.

Q. As a matter of fact, at a number of these mills there are villages of several thousand people living in and adjacent to, whose homes and schools and churches are lighted by the mill?

A. Wherever it is mill property and used in connection with that, the contract stipulates and provides for the use of it in lighting those properties.

The population of Kannapolis, where the current is being sold to the mill, is easily 2,000 or 3,000 people, perhaps more. The mills at Durham and West Durham have large villages lighted in the same way. Practically every cotton mill we drive has its mill village, and a great number of them light it from their power.

Q. In your testimony before the Corporation Commission, I will ask you if I did not ask the following question in which you gave the following answer, referring to the contract clause in the High Point contract about the scrapping of the plant:

"Q. As a matter of fact they have not now any steam plant connected with the utility, have they?

"A. As a matter of fact they have not any there now, and they practically had none when I made that contract; just about dismantling, and they were urging that we take on that service.

"Q. But in order to make it certain you thought you would put that clause in?

"A. They were as anxious to put the clause in as I was."

Is that what you said?

A. Yes, sir, that is what I said there; they were even more anxious to put it in.

Q. Who wrote the contract?

A. I could not tell you.

Q. You write all your contracts, do you not?

A. Yes, all of our contracts today are in printed form, but at that time the contracts were usually prepared by our company and submitted to the other company for them to look over.

174 I rather think it was done in this case, but I am not absolutely sure. We did not make an application in Greensboro for a franchise to operate a steam railroad, nor to operate a gas plant. As a general proposition, especially in recent years, since the cost of labor and supplies has increased so much, street railways in North Carolina are unprofitable. I rather think the N. C. Public Service Co. has built additional street car lines since we connected with them, but I could not answer that. In our application for a franchise to the City of Greensboro the schedule of rates filed for lighting the homes and houses, as I understand, is the same rate that the N. C. Public Service Co. were charging at that time, but is not the same rate that they had been charging for the last several years. It is the same rate that the N. C. Public Service Co. is charging now. The cards showing the rate have this one difference: The N. C. Public Service Co. allowed a discount of 5%, but allows no discount if the

bill is less than \$1.00. The Southern Power Co. card shows a discount of 5% where the consumption is over 100 kilowatts and 3% on bills where the consumption exceeds 100 kilowatts. With that exception the rate is the same. This rate is approximately the same as charged by the Southern Public Utilities Company in Charlotte, and I think the same as it charges in all other towns it serves. The stockholders of the Southern Public Utilities Co. are to a large extent stockholders in the Southern Power Co. Their general offices are in the same building at Charlotte. They have branch and division offices all over the territory it serves. The Southern Public Utilities charges up to about 4 years ago a basis of 10c. instead of 9c. It was reduced during the war from 10c. to 9c, but prior to that I do not know how far back that 10c. base rate extended. I do not recall that they charged 14c. in Charlotte earlier. I expect they did charge that back in the earlier days, perhaps more than that; before the business developed or before the apparatus had been developed for handling the business. They reduced their rate from 10c. some time before the Southern Power Company made application for a franchise in Salisbury. We turned in 100,000 volts at the generating station. On account of loss and drop in voltage when it reaches here it is perhaps 10 or 15% less.

175 The Southern Power Co. completed its lines into Greensboro the latter part of 1909 or the earlier part of 1910. Since that time there has been added to the system possible three hydro-electric power plants and two or three steam stations. The three aggregate about 150 odd thousand horse power. We have four steam stations with near 50,000 horse power capacity, but I do not think all of them were built since that date. We connected in the fall of 1920 with several Alamance County mills. We sell current to municipalities for resale, in addition to those mentioned heretofore, in North Carolina, at Shelby, Statesville and Morganton, and the Southern Public Utilities Company owns the plant at Hickory, N. C.

Witness identified letter marked "Exhibit A" as having been issued under his instruction. Also identified letter dated Jan. 8, 1914, marked "Exhibit B," as genuine.

The Wateree Electric Co. owns the generating station, which is leased to the Southern Power Co., in addition to being a holding company. It owns somewhere in the neighborhood of 85% of the stock of the Southern Power Co., perhaps more. It has no transmission lines in North Carolina. It has only one plant, the Fishing Creek Plant, at Great Falls, which is leased to the Southern Power Co., and the Southern Power Co. operates and maintains it. The Catawba Manufacturing & Electric Power Co. owns undeveloped property in and around Mt. Holly. The Western Carolina Co., the O. N. W. that owns the Bridgewater plant, owns some undeveloped property on the Catawba River near Hickory, N. C. Their ownership includes Horseford Shoals, near Hickory, and Connelly Springs, just above these shoals. The Toxaway property and part of that power site is owned by the Great Falls Power Co., if I remember correctly. It also owns the undeveloped Haw River Power Co.

The Bridgewater development is owned one-third by the Southern Power Co., one-third by the Great Falls Power Co. and one-third by the Wateree Electric Co. There is a large storage reservoir with a power plant combined. The Southern Power Co. leases the

176 Bridgewater plant and pays as a rental for that 10 mills per kilowatt, guaranteeing to use enough power to amount to a rental of \$500,000 a year. It also operates and maintains the plant and station. It pays this whether it uses the water or not. It might have water elsewhere and leave it there and not use it. It is located between Morganton and Marion, pretty well up the river. The purpose was to impound the water and produce this power in the low season by water power cheaper than steam, and it is used as a seasonal power, and is not run regularly all the time. The first power development reached by that water after it passes over the dam at Bridgewater is Lookout Shoals station. The Southern Power Co. owns and operates that. The next development it reaches is the Catawba Power Co., near Rock Hill, S. C.

Q. How much was the Southern Power Co. paying for hydro-electric current for that before Bridgewater was completed?

A. I think they were paying five mills and have been paying it prior and since.

Q. After that power at Bridgewater was developed you did increase your price in the lease with some of the other companies?

A. Yes, we did with the Great Falls plant. It next reaches the Great Falls plant. Before this reservoir was built we were paying Great Falls, I think, about 3.6 mills. We changed the contract at the time we were building, or prior. We now pay 4 mills. The contract was likewise changed at Rocky River development.

Redirect examination for defendant:

The Southern Power Co. system is composed today of the Southern Power Co., Catawba Power Co., Great Falls Power Co., Wateree Power Co., the Wateree Electric Co., and the Western Carolina Power Co., to name only the companies which have developed properties. The Catawba Power Co. was organized in 1900, before the organization of the Southern Power Co., by Dr. Wiley and certain associates. Mr. Duke was not originally one of its organizers. I never met Mr. Duke until we had completed the Catawba Power Co. development and had it in operation. I went with this company in 1903 and completed the development of it. Upon the organization of the Southern Power Co., or shortly thereafter, 177 it purchased all the stock of the Catawba Power Co. The Southern Power Co. then purchased from the American Development Co. certain water rights and land in South Carolina, for which it paid the American Development Co. four million dollars of the common stock of the Southern Power Co. The property thus purchased consisted of about six or seven miles of land and water rights on the Catawba River located at Rocky Creek, Fish Creek and Great Falls. It also consisted of rights they had secured from the State of South Carolina for the use of a canal the State had built

about 100 years ago for navigation purposes. It consisted of about four or five miles of lands and rights on the Wateree River near Camden, S. C. There were several thousand of acres of land in this. It is quite an area, developed now as a town of three or four thousand people located on the property. The water rights we secured from the American Development Co. are the most valuable rights we have ever purchased, and now where since have we been able to get rights at such value as we got those for. They were well worth four million dollars in connection with this development. Following that the Southern Power Co. built the Great Falls station, the Rocky Creek station and the Ninety-nine Island station. In 1910, after completing these plants and getting them in operation, we placed a bond issue authorizing ten million dollars of bonds on this property. We hesitated for some time; at first we thought of five millions, and finally we did push ourselves up to ten million dollars, thinking that would be an enormous amount of money to make this development. We made a great mistake that we did not make it fifty million dollars or more at that time. The bonds were not all issued. Only three million dollars were sold at that date and the other up to seven million, which was the total outstanding, have since been sold as we developed these properties, but that has not been adequate amount to develop the properties, so the result has been that we have had to form additional companies to develop these properties. We could not develop a new plant and put it under the Southern Power Company's name. If we did, it would be a second mortgage on it. The mortgage of ten million dollars covered the property lines, stations, generating stations, or
178 any future extensions or stations of the Southern Power Co., and we were authorized to issue additional bonds on additional property whenever it was put under the mortgage, so anything afterwards developed as the Southern Power Company property automatically went under this mortgage, consequently we could not develop any plant as a Southern Power Company plant without it becoming subject to this mortgage, and we could not finance it as a second mortgage, was the reason we had to develop as separate companies.

We went into all this matter before the Corporation Commission fairly thoroughly. I testified there as to the relation between all these companies and produced everything the Commission asked for. The North Carolina Public Service Company and the other protestants in the case before the Corporation Commission had their accountants in our office. We offered to give to their accountants any data or record we had, also to their engineers. They had three or four men there I suppose a couple of weeks. We gave them everything they asked for, and I suppose all they wanted.

I testified for four days before the Corporation Commission at Raleigh. They did not put their accountants on the witness stand to contradict anything I said. Their accountants were there. The respondents did not offer any evidence. I testified before the Corporation Commission that the property composing the Southern Power Co. system was worth 75 million dollars. I was corroborated

in that statement by two very prominent engineers, not exactly as to the amount, but approximately that amount, ranging from 65 to 75 million dollars. Those engineers had no connection with the company. One was D. C. Jackson, professor of electrical engineering at Massachusetts Institute of Technology, and quite a noted consulting engineer. The other was W. N. White, chief hydraulic engineer of the Allis Chambers Co. I understand that Mr. Jackson was an officer of the U. S. Army. The N. C. Public Service Co. had present at the hearing Dr. McClellan. He was one of the men who came to Charlotte to see me about the rates. He came on other occasions. I am not sure whether he came with the representatives of the N. C. Public Service Co. I rather think he came as a representative of them. They said they were sending him. He had the data and information about their companies, which we discussed. I received this letter from Mr. Hole:

(Dated May 8, 1918.)

"W. S. Lee, Vice President Southern Power Co., Charlotte, N. C.

DEAR MR. LEE: Beg, to acknowledge receipt of your letter of May 7th addressed to Mr. C. B. Hole. Mr. Hole is laid up temporarily, and I have written Dr. McClellan, asking him if the date suggested by you would meet his convenience. As soon as I hear from you I will let you know immediately."

Dr. McClellan later visited me in Charlotte. He lives in Philadelphia. He is consulting engineer, also professor, I believe, at the University of Pennsylvania.

Q. He came up to discuss the matter of rates with you?

A. Yes, sir. He came up to argue with us that we should make a lower rate to the N. C. Public Service Co. than we were proposing. We had several hours' discussion in our office. He was present at the Corporation Commission hearing.

Q. He heard the testimony offered by the Southern Power Company in support of the rate which it had promulgated?

A. Yes, he was sitting there a great deal of the time. He heard the testimony as to the value of the Southern Power Co. property. They did not put him on the stand. The Southern Public Utilities Company was organized in 1913.

Q. Had the Southern Power Co. prior to that time been distributing electricity locally in some of the towns of North Carolina?

A. They had been distributing power prior to 1913 to some of the towns, and also had purchased from time to time some of the properties of other companies that were distributing.

The Southern Power Company purchased stock in other companies and distributed through these local companies. The Southern Public Utilities Company was organized as a separate company, but has been affiliated with the Southern Power Co. The Southern Power Co. turned over all of the property it had in the towns it was serving. That is, in distributing elec-

tricity to them locally. The Southern Public Utilities Company has since that time distributed locally electricity in those towns.

Q. From the time of its organization the Southern Public Utilities Co. was paying for electricity which it received a price ranging from 9c per kw. to 1.1c per kw.?

A. For all the properties which it owned at that time it has been paying on that rate from 9c down to 1.1c, depending on the consumption. It acquired other properties since then that it pays 9.1c down to 1.2, namely, the Reidsville property.

Q. At first it charged for electricity which it distributed a price ranging from 10c kw. down?

A. I don't know at that time, as I explained to Mr. Brooks a while ago, what the rate was in 1913, but I did say the rate was a few years ago a base of 10c and it was changed to 9c. I remember about the time, but I cannot give the exact date.

Q. Then in the meantime during that same period of time, although the N. C. Public Service Co. was getting its electricity in Greensboro and in Salisbury at the flat rate of 1.1c, it was charging from 12c down?

A. They were charged a base rate of 12c and were getting their power cheaper than the Southern Public Utilities Co. were getting it from the Southern Power Co. In fact, they never have paid as high rate as the Southern Public Utilities Co. in Greensboro and Salisbury.

Q. In Salisbury they are paying 1.88?

A. They are paying that on argument and under protest.

Q. About the time you began charging them 1.88 they dropped from 12 to 9?

A. Yes, sir.

Q. That was about the time the Southern Power Co. got the franchise in Salisbury?

Q. You stated here that you are not willing to enter into a contract with the N. C. Public Service Co. to sell them power for distribution in competition with the Southern Power Co.?

A. Yes, sir.

Q. Do you know what customers the Southern Power Co. has at High Point?

A. Yes, we have some customers there, the Pickett Mills, for instance, and Highland Mills.

181 The Court: How do you get in there?

A. Our substation is inside the city limits, but this Pickett Mills is just outside the city limits and near our substation.

By Mr. Robinson:

Q. Have you any customers in the vicinity of Greensboro to whom you sell electricity directly?

A. Yes, we have in the vicinity of Greensboro two or three rather large customers, the Proximity Mills, Revolution Mills, Pomona Mills.

Q. Have you had applications at High Point for other customers for service recently which you have been unable to fill?

A. Yes, we have had applications for power at High Point for a concern located at our substation, just a fence between, the Melton-Rhodes Co. people, and we advised those people that we could not supply them, we did not have the power. It is now being supplied by the N. C. Public Service Co. They contracted for it. Our substation is in the city limits, so is this place, and a fence between them is all that separates our property and theirs.

Q. How does it happen that the N. C. Public Service Company can supply the Melton-Rhodes Company when the Southern Power Company cannot?

A. That is just what has got my entire company very much disturbed about the whole situation. We have a very peculiar phase of it right there. We have a certain amount of power to supply; we have no contract with the N. C. Public Service Co.; they are going on increasing their load faster than ever since we have been serving them. In the meantime we are forced to turn down applications for power from customers all over the system, and this particular point comes right square back to the limit of High Point. We refused the Melton-Rhodes Company service and our substation is in a stone's throw of their plant. We have been driving the Pickett Mills, which is a few hundred yards the other side of the substation, and we have been forced to refuse our old customer service there, and they would be forced to shut down the Pickett Cotton Mills today if it was not for the depreciation in the cotton mill industry, and these strikes on, and it looks as if our contracts with our customers will have to be curtailed in order to take care of the contracts that the N. C. Public Service Co. is making right along. If that matter was carried on to a conclusion, I do not see where we can get the power and we would have to cut off some of our customers today if it was not for the fact that this curtailment is on.

Q. You have no contract with the N. C. Public Service Co.?

A. We have no contract with the N. C. Public Service Co. and their load is increasing very fast by selling power when we have positively forbidden anybody to sell elsewhere on the system. We cannot pull it.

Q. You will have to cut off your own contract customers?

A. If it stays on.

Q. Did you have application from the Southern Railway Co. to supply them power out at Pomona, some distance from the city limits of Greensboro?

A. Yes, sir.

Q. Were you able to fill that obligation?

A. No, sir; we told them that we did not have the power to supply it over our contracted power.

Q. Did they subsequently get power from some source?

A. I cannot say about that. I have heard they have, but I do not know.

Q. You do not know whether the N. C. Public Service Co. undertook to supply them with your power?

A. Nothing but hearsay.

Q. Mr. Brooks asked you about the wasting of water and you stated you wasted more water over your dams than was used in the generation of power. In calculating the amount of water wasted over the dams, were you referring to large floods?

A. We make a measurement of all the water, flood water and every bit of water wasted, and computing its value in power, and very often that occurs with a very large flood, that we lose a lot of power.

Q. What time of the year do you ordinarily have the heaviest load?

A. The load varies, of course, with the conditions of the market, but our heavy load is usually in the fall of the year.

10.30 A. M. Monday, June 21, 1921.

W. S. LEE, witness for defendant, recalled.

183 Redirect examination resumed by Mr. Robinson:

Q. Mr. Brooks read you a part of your testimony before the Corporation Commission, in which you stated that Mr. Richardson, of the High Point Company, was as anxious to scrap his steam plant as you were. Will you please state to the Court whether you had any anxiety with reference to the scrapping of their steam plant?

A. We had no desire to scrap the steam plant and never intimated any such desire at any time. It was a different kind of power that they were generating from what we generated and for them to use our power it was necessary for them to dismantle their plant. They did dismantle it and they sold that apparatus for what they could get for it and replaced the motors, with some of their customers using the alternating current instead of the direct current. I have turned over all the correspondence to and from Mr. Richardson here for examination and nowhere have I ever asked that they scrap that plant or dismantle it nor have I ever asked any customer of the Southern Power Co. nor is there any contract that the Southern Power Co. has ever made that has required anybody to dismantle the plant, and this is the only case in which it has ever been referred to at all.

Q. Mr. Brooks also read from a letter from you to the N. C. Public Service Co. which dealt with the size of the substation which should be installed here and also a letter from Mr. Burkholder to the N. C. Public Service Co. which referred to certain information the N. C. Public Service Co. had furnished him regarding the power market at Greensboro. Will you state to the Court what was the purpose of those letters?

A. Those letters were exchanged between the N. C. Public Service Co. and the Southern Power Co. at an early date of its contract, in fact, some of them before we had actually begun service. We had made a contract for ten years with the N. C. Public Service Co. for a definite amount of power and in that contract we contemplated that this business should grow in ten years. It did grow; it was almost two or $2\frac{1}{2}$ times as large at the end of ten years as it was at first. It is not our custom to build power plants, lines and substations to pro-

184 vide for the entire output of a contract that is changing over a period of ten years, but we do make careful estimates and surveys to try and determine how much power we will have to furnish and about when we will have to furnish it, and that information was secured for the purpose of seeing what our obligations would be from year to year ranging over the term of time of that contract.

Q. He also asked you with reference to certain undeveloped hydro-electric power which the Southern Power Company owns. Will you state whether the Southern Power Co. owns any undeveloped hydro-electric property on the Yadkin River?

A. It does not own any property on that river.

Q. He also examined you with reference to hydro-electric plants which the Southern Power Company leases from certain affiliated companies. Will you state whether any of these affiliated companies own any transmission lines?

A. No, sir, they own no transmission lines. The only lines they have are in their stations or on the grounds; they transmit no power.

Q. With reference to the mills using part of the electricity which you furnish to them for the purpose of lighting the house of their employees, do you know whether the cotton mills charge their employees anything for that lighting?

A. I do not know absolutely. There are a great number of them, but most of them do not. As to whether any of them do I am not sure, I rather think not.

Q. Is the Southern Power Co. ready, able and willing to sell and deliver electricity to the City of Greensboro and to the City of High Point, or either of them, for the use of these cities and their citizens and inhabitants, upon the same terms and conditions that it is now offering to sell electricity to other cities and towns in the State of North Carolina, or at rates and upon terms and conditions to be fixed by the Corporation Commission of the State of North Carolina?

A. Yes, sir.

Recross-examination by plaintiff:

Q. Then you have enough service to furnish the service to Greensboro and High Point if they contract with you for it?

A. If we furnish them now through some other company the same service I assume we can serve them.

185 Q. You said to Mr. Robinson that you were ready, able and willing to do it at Greensboro and High Point if they would give you the contract. Then you are ready, able and willing now to furnish the demand, and have got the current?

A. You ask me that question? I told you yes, I was.

Q. You were asked about this outside service. Your company knew that the N. C. Public Service Co. was taking on this Armour contract?

A. No, I did not.

Q. Didn't you know that the officers of your company negotiated and consented for the N. C. Public Service Co. to take on that load?

A. Perhaps I did. I say I did not—I do not recall it.

Q. Look at this letter from Mr. Burkholder, dated Charlotte, N. C., Dec. 19, 1912, (Exhibit C):

"Mr. C. H. Andrew, Mgr. North Carolina Public Service Co., Greensboro, N. C.

"DEAR SIR: I thank you for yours of Dec. 18th in regard to the size of meter necessary to take care of the additional power which you are to take for the Armour Fertilizer Co. and have to advise you that this matter has already been checked over and the meters are sufficient for this increased power. Yours very truly, Southern Power Co. Chas. I. Burkholder, Gen. Mgr."

Hasn't the N. C. Public Service Co. built in joining and connecting with your substation in order to take care of the voltage of the Armour Company?

A. It seems from that letter they furnished the service for several years and increased it in 1912, and Mr. Burkholder said the meter was already installed to take care of the additional load.

Q. You have no line out there?

A. No, sir.

Q. You are not able to serve them now, you have no line? They built that line, not against your wishes, but in accordance with the wishes of your company?

A. I do not know anything about that.

Q. Look at this letter of April 10, 1917:

"N. C. Public Service Co., Greensboro, N. C.

186

Attention of Mr. C. H. Andrews.

MY DEAR SIR: High Point sub-station Circuits. Referring to your letters of April 6th and 9th and my letter of April 5th; kindly advise me if you are contemplating any increase on this circuit, if so, what capacity, as we would like to take care of the future as well as the present. Respectfully yours, Southern Power Co. John W. Fox, Engineer Mill Power Department.

(Letter referred to marked Exhibit D.)

Q. I also show you a letter dated April 6th, 1909. (Reads letter hereto attached, marked "Exhibit E.") The Normal College is outside the city limits of Greensboro, is it not?

A. I do not know, sir.

Q. The N. C. Public Service Co. is furnishing light out there?

A. I do not know that.

Q. That is your information, is it not?

A. I think it is.

Q. You did not try to get that business, did you?

A. I could not say. There is the correspondence from Mr. Mil-mow. Evidently they had something to come up at the time. I could not say. I will say that all the letters you are submitting to me are back at the beginning of this contract and I stated a while

ago that we were anxious to find just what we had to supply under it. We agreed to furnish a certain block of power and at that time we were anxious that you build your load up, we had the power for sale and were anxious to assist you in any way we could, but at the same time we wanted to know in all cases how much power we would have to supply and at what time, as the contract ran over a period of ten years, and some of those letters were even before we began service.

Q. The contract began in 1908?

A. Yes, but we had to build lines.

Q. See if you wrote this letter of 1914, Dec. 3rd, and received the one attached?

A. Yes, this correspondence passed and this is a letter written by me and my signature.

187 (Letter hereto attached, marked "Exhibit F," together with answer thereto.)

Witness was read letter "Exhibit G."

The signal service spoken of a while ago was from Greensboro to Danville. The letter states that Mr. Deal asked me if they could take on the power to furnish the Southern Railway for signal service on their line north of Greensboro, and I wrote him it would be satisfactory to us to do so.

Witness is shown "Exhibit H," dated March 21, 1914, and also Exhibits "I," "J" and "K."

I wrote Exhibit "K." I think I stated yesterday that we had contracts with consumers outside of Greensboro and High Point. In High Point we have the Pickett Mills and the Highland Mills. The Southern Power Co. is serving the municipalities of Albermarle, Lexington, Monroe, Mooresville, Newton, and the University. I stated Saturday that I had testified before the Corporation Commission that the allied power interests which had made application for fixing the rates before the Corporation Commission was worth \$75,000,000 in my opinion.

I stated before the Commission the exact cost of them, and stated the figures in detail. I think it was about 38,000,000, the actual cost of this property, and I stated how they had been built, the times they had been built, the way they had been financed, and the economy in the construction and design very thoroughly, and I further stated in my opinion those properties, all of them, were worth anywhere from sixty-five to seventy-five million dollars. We were not asking the Corporation Commission to fix a reasonable rate on what the properties are worth. We did not ask for a rate that would give a return on \$75,000,000 of property. We filed a set of rates, and figured it out in detail, giving exactly what it would produce on the amount of business we had done for twelve months previous to this request. We showed what that would figure out on the basis of actual cost of it, on the basis of the assessment for taxation according

to the N. C. Corporation Commission's own assessment, and
188 we figured what return it would make on the basis of what we
considered the property's worth. The amount we asked for
I do not think is a fair return on either the cost, the tax value or the
value of the property. We submitted in detail all the figures and
everything before that Commission for them to give us a just and
reasonable rate on this business.

Q. About what is the average per cent. increase asked for?

A. I went over that very thoroughly and I had a great mass of
figures at hand, and at my command, and I gave it in detail there.
There are a great number of rates for different services, but I would
say the average increase over the rate we were getting, taking in the
old contracts and more recent ones, was approximately 30 to 32%
higher.

Q. Has your company at any time sold primary power to cotton
mills or municipalities or local public utilities at less than 8 mills,
the amount fixed in the Concord contract originally?

A. No, sir, I do not think they have—I would like to correct that.
The old Catawba Power Co., the company we took over, did sell some
power back in 1901, I think, perhaps lower than that, but the South-
ern Power Co. I do not think has sold any contract to any mill or any
municipality for less than 8/10 of a cent per kilowatt hour.

Q. Is your company now charging any municipality or public
utility or cotton mill as much as 1.88 except in Salisbury to the N.
C. Public Service Company?

A. None of that size. We are charging some that use a smaller
consumption more than that, but the N. C. Public Service Co. in
Salisbury is another case somewhat similar to this, in which we
cannot get them off the lines or get them to make contract. At the
time they demanded power it was necessary for us to produce power
by steam, and that rate was made up as a composite rate of steam and
water and is now being contested in the courts, as I understand it,
and the case has never been finally adjudicated. Our rate today
for that service is the one we have on application before the Corpora-
tion Commission which has not been decided.

Q. The rate you have applied for before the Corporation Commis-
sion—how much would that be at Salisbury?

189 A. It is a block rate on consumption, but it will begin
under schedule 8 at 6c. and go down to 1.2.

Q. What, approximately, would be the cost to the Public Service
Co. at Salisbury under the applied for rate?

A. I cannot tell you offhand, I do not know the consumption or
just what block it would run in.

Q. It would be around 14 mills?

A. Perhaps you are right, I cannot tell you.

Q. Pending the application before the Corporation Commission,
you are charging all the consumers who have contracts the same
amount as stipulated for in the contract?

A. Yes, sir, pending this rate decision we are charging and carry-
ing our contracts along just as stipulated in the contracts. All con-

tracts expiring we are carrying on at the rate we have applied to the Commission for.

Q. The Southern Public Utilities Co. issued a circular order to reduce its rate you were speaking of from 10 to 9c.?

A. I do not know—I presume they did.

Q. Look at this, copied from the Charlotte Observer, Wednesday, 3-26-19, and see if that is not the circular they issued.

A. I do not know whether this is or not. I do not doubt it at all, if it is a question of determining it, but I do not care to answer to it. I have no doubt you are correct. I stated on Friday that they had changed the rate. That is a circular distributed by your North Carolina Public Service Co. I assume it is right. I am not going to deny it, but I am not going to swear to it. We have had to defer hydro-electric development until we can get a rate that would pay for a fair return on what we are doing before we could secure money to build new plants to take care of the additional load that is being required of us. We are awaiting the action of the Corporation Commission on that matter. We cannot get the money to carry on the new business or build new plants unless what we have will pay a fair rate of interest, and we are holding up and have been for some time for that reason. Mr. Duke has a very large interest and has been of great financial assistance to these companies. He has lent us money at times when we could not get it elsewhere, and at times when we could not sell our securities he has loaned us his government bonds, on which we have borrowed money; in fact, we are paying back money today that we borrowed for the past four or five years; and we borrowed J. B. Duke's government bonds in order to negotiate those loans and get the money at a low rate of interest. You might say he is in the active control and management of all these properties. He has large interests in it, he takes a personal interest in it, and he is very fond of developing anything.

Re-redirect examination by defendant:

The occasion of the writing of the letter of December 11th, 1917, was that during the time that we were negotiating with these people in connection with renewing their contract they had made considerable claims about defective service and interruptions; in fact, they had an engineer, I forget his name at the moment, that came down to see Mr. Burkholder and myself. He was of the firm of Westinghouse, Church & Kerr, and discussed this very question. There was considerable discussion about the matter, in which they claimed we were causing interruptions, and we, of course, cited some instances in which there were interruptions caused by their own system which they were placing at our door and calling our substation attendants, stating the current was off, when as a matter of fact off on their own system, but we did continuously and earnestly try to better the system, and we went to considerable expense, and the letter I wrote him was telling him frankly what we were doing, and why we were doing it, in order to improve the service, and as all these towns have grown we

have had to improve the service more or less as the power increased and as the service became more exacting. That is the reason some of these rates have got to be put up for this service which is getting better all the time.

Witness was recalled, and, being further examined by plaintiff identified plaintiff's "Exhibit K," and said that he wrote the letter. Plaintiff then offered it in evidence.

Plaintiff further testified that the map handed him, marked Plaintiff's "Exhibit L," and introduced in evidence, is a map of the

191 Southern Power Company's transmission system, showing the other power companies in and around that territory. The maps were distributed during the last two or three years.

Q. I wish you would look at this and see if that is your printed form of power contract that you use with mills (handing witness "Exhibit M").

A. Yes, this is one of the printed form. We have used different forms at different times.

Q. Is this the printed form you had with municipalities and other public utilities companies to which you sold (referring to "Ex. N")?

A. Yes, this is one of the other forms used at different times for municipalities. This, of course, would have to apply to the particular time and the rate in effect at that time. They are changed as the rates change and certain conditions of delivery and other conditions are changed in them. This is one at the time the rate was 9c. per kilowatt hour down to 1.1c. per kilowatt hour.

Q. Those contracts were made for ten years, and if in a year or two afterwards you desired to change the rates you raised the rates and made ten years' contract all on the raised rate?

A. No, sir; that is not a statement of the condition. This company has a good many rates that have been entered into contracts between its customers since the organization of same. It has been the policy of the company to have a rate and at the time that rate was in existence all contracts were made with that rate for like service, and we could not change nor did we try to change the contract if we changed the rate afterwards, but if a customer made application for a contract at another time and the rate had been changed, the new rate, of course, would apply at that time. We have kept that as a rule and regulation of our company since its organization.

Q. And you carry out at the low rate under the old contract the existing with any other customer you might have?

A. We carry out at the rate in the contract whenever it was made and are carrying out the contracts with our customers.

Q. How much higher would you say the average amount you are asking for the rate to be fixed by the Corporation Commission is above what you originally started to sell under your contract for?

A. We sold, as I stated to you on the stand a day or two ago contracts for 8/10 of a cent per kilowatt hour, one of which

192 was the City of Concord, but that contract was not on a kilowatt hour basis, but the City of Concord guaranteed to take a certain amount of power and pay for it whether it consumed it or not, so the net result was that we got higher than 8/10 of a cent per kilowatt hour for it. To tell you what this rate would amount to that we have applied for on the lowest rate I would be unable to do so. The rate we have applied for, I think, would average around 1.25 to 1.3c, and the lowest we ever sold it for that service was, as I explained to you, Concord, in which they had to pay for a block of power on a flat basis. We got much more than 8/10 or a cent per kilowatt hour for what power they delivered. They made that contract and gave us a larger block of power in order to get us to extend our lines into their territory.

For a great many months or years I think they did not consume the power they contracted for. They have since renewed their contract and they are paying a higher rate for it in Concord. If I remember, they asked me to compare the difference of their contract they have now and the rates we applied for before the Corporation Commission, and I believe the increase in the City of Concord amounted to \$50.00 per month.

Reexamined for defendant by Mr. Robinson:

Q. Will you take this letter that has been referred to by the plaintiff, and take that financial statement referred to in the letter, and explain the statement so that it will be intelligible?

A. As I understand, this letter was introduced to show what earnings the Southern Power Co. was making regarding certain statements from brief submitted yesterday afternoon. The Southern Power Co. first built the Great Falls, Rocky Creek and Fishing Creek plants, and for that they sold bonds at 100c on the dollars and built those plants. They also had borrowed additional money. In 1910 they placed a bond issue of ten million dollars on the Southern Power Co. property and the Great Falls Power Co. property, having sold to the Great Falls Power Co. just before placing this mortgage the Great Falls, Rocky Creek and Ninety-nine Islands station. At that time there was three million dollars of the ten million of bonds sold. These bonds were sold from time to time as the Southern Power Co. needed the money for carrying on their developments, extending their lines, building substations and power plants, and the letter that has been handed me here is dated June 11, 1915. At that time we were offering \$1,200,000 of these bonds. With the sale of this \$1,200,000 of bonds, it brought our outstanding bonds up to \$7,000,000, and in preparing a statement of the earnings of these companies, I had prepared a statement showing the earnings of the Southern Power Co. and the Great Falls Power Co., and the earnings as shown here, gross receipts of \$2,485,789.79, was the earnings from the Southern Power Co. and the Great Falls Power Co., in fact you will note in this statement under earnings and expenses of the mortgage property as officially reported for the year ending April 30, 1915. The mortgaged property

was the Southern Power Co. property and the Great Falls property. There has been put into the property not six million dollars of preferred stock of the Southern Power Co., but there had been put in this property the six million dollars of preferred stock of the Power Co., the \$5,800,000 of bonds and the money we sold the stock of the Great Falls Power Co. for. In other words, at that time there was certainly from twelve to fifteen million dollars in this property over and above the bond issue and the earnings were simply shown to show how well protected the bond would be and did not portray the investment of earnings on the property.

Q. Then your letter was written in order to show what security there was behind these bonds you were undertaking to sell?

A. Yes, states that.

Q. And those were the bonds of the Southern Power Co. and they were also protected by a mortgage on the property of the Great Falls Power Co.?

A. That is correct.

Q. So in showing the backing these bonds had you included the property and earnings of both of those companies?

A. We did not include the property, but we included the earnings in showing what was behind those bonds, as the mortgage covered that company.

Q. Mr. Brooks asked you about the form of contract with cotton mills. Do you know how many different forms of contract for cotton mills are in use at the present time?

A. I suppose 20 or 25.

Q. Do you know how many forms of contracts are in use
194 for selling power to municipalities at the present time?

A. Certainly 15 or 20.

Q. And all those contain many blanks for putting in the special terms and conditions?

A. All contracts contain blanks for filing in the different conditions that exist at the time of making the contract with the particular company.

Q. That letter at the time your wrote it contained a correct statement of the conditions at that time?

A. It did, exactly as I have stated.

The defendant offered in evidence the following contracts between the North Carolina Public Service Company and certain other parties, produced upon the trial by the North Carolina Public Service Company in response to a notice to defendant to produce same, as follows:

North Carolina Public Service Company and the City of High Point, dated October 19, 1909, marked "Defendant's Exhibit 16."

North Carolina Public Service Company and City of High Point, dated June 15, 1914, marked "Defendant's Exhibit 17."

North Carolina Public Service Company and City of High Point, dated August 12, 1914, marked "Defendant's Exhibit 18."

North Carolina Public Service Company and the City of High Point, dated March 2, 1920, marked "Defendant's Exhibit 19."

Paid bill, City of High Point, for power purchased from the North Carolina Public Service Co., receipted June 10, 1921, 830 kilowatt hours, at 1.75, \$14.52, marked "Defendant's Exhibit 20."

Bill from the North Carolina Public Service Co. to City of High Point for 87,500 kilowatt hours at 2.5c kilowatt, paid June 19, 1921, marked "Defendant's Exhibit 21."

High Point Public Service Co. and the High Point Hosiery Mill, dated Feb. 1, 1915, marked "Defendant's Exhibit 22."

North Carolina Public Service Co. and the Stehli Silk Corporation, dated Oct. 27, 1916, marked "Defendant's Exhibit 23."

North Carolina Public Service Co. and the Durham Hosiery Mills, dated April 1, 1917, marked "Defendant's Exhibit 24."

North Carolina Public Service Co. and Armour Fertilizer Works, dated Dec. 1, 1917, marked "Defendant's Exhibit 25."

North Carolina Public Service Co. and Swift & Co., dated July 30, 1917, marked "Defendant's Exhibit 26."

And also introduced in evidence:

Franchise from the City of Greensboro to John Kerr, W. D. Barr and their successors, associates and such corporations as they may organize, dated May 24, 1901, which franchise the North Carolina Public Service Co. has succeeded to, and which is the franchise under which the North Carolina Public Service Co. at present does business in the City of Greensboro. The defendant is introducing in evidence the original of this franchise as contained in Minute Book No. 3, page 254, and following of the minutes of the City of Greensboro. Marked "Defendant's Exhibit 27."

Defendant offers in evidence also original application or petition of the Southern Power Co. to the City of Greensboro for franchise in the City of Greensboro, dated 26th day of April, 1920, and which it is admitted was filed with the Mayor and Board of Commissioners of the City of Greensboro. Marked "Defendant's Exhibit 28."

Proposed franchise submitted by the Commissioners of the City of Greensboro to the voters of said city in response to the petition of the Southern Power Co. for a franchise in the City of Greensboro. Marked "Defendant's Exhibit 29."

Original return of the canvassing board, showing the result of the election upon the question of granting franchise to the Southern Power Co. to have been 990 votes against granting the franchise and 78 votes in favor of granting the franchise. Marked "Defendant's Exhibit 30."

Charter of the North Carolina Public Service Co., contained in the private laws of North Carolina, session of 1909, chapter 24.

Defendant Southern Power Co. also introduces in evidence the following contracts which were produced by the North Carolina Public Service Co. in response to notice from the defendant to purchase same:

Contract with Melton-Rhodes Co., dated May 23, 1920, to supply

with power electric motors in the factory of the Melton-Rhodes Company in High Point for five years.

Contract with Moffitt Underwear Co., dated Feb. 11, 1918, for five years, to supply with power electric motors of the Underwear Company in its factory at High Point.

Contract dated Jan. 3, 1921, with the Peerless Veneer Company to supply with power the electric motors in the factory of the Veneer Company at High Point, for five years.

Contract dated August 9, 1920, with W. A. Watson Co. to furnish power for the roller mills of the Watson Company and runs for five years.

Contract with the Raymond Veneer Co., dated Feb. 12, 1921, to furnish power for the veneer plant, for five years.

Contract with the Arctic Ice & Coal Co., Greensboro, N. C., dated April 8, 1919, to supply power for their equipment, consisting of 40 horsepower motors.

197 R. L. PICKETT was next examined as a witness by defendant, and testified:

I am City Manager at High Point. We have a contract with the N. C. Public Service Co. for incandescent and arc lights and pumping. The incandescent lights is the current for domestic and the arc lights are street lights. We purchased current for a pumping station. We get the incandescent current from the N. C. Public Service Company's substation. This current runs to the homes of the citizens of our town over the city's wires. They are strung on the city's poles and some on the Public Service poles. Where the arc circuit goes over the city, the city uses the company's poles. Wherever the company had established poles for furnishing the arc lights under our contract, the city had a right to use those poles in stringing our wires for incandescent lights. We use their poles. Where they did not have their poles for that purpose, then we put up our own poles. We have 30 or 40 miles of wire strung in High Point. The city owns the incandescent wiring. The N. C. Public Service Co. is about a mile from the substation of the Southern Power Co. The city pays the Public Service Co. for current used for domestic purposes two and one-half cent- a kilowatt hour. The city has two pumping stations, one east of the city, about the corporate limits, and one at Jamestown, Deep River. The latter is about four miles from the corporate limits. The Public Service Co. furnishes the city current to operate their pumps at both of these stations. We own the wiring from the city limits to the Jamestown pumping station. The current goes over our wires to the pumping station. We pay $1\frac{3}{4}$ c. per kwh. for that current.

The Public Service Co. under its contract keeps up the white-way system. The city has nothing to do with that except pay for it. We pay \$175.00 a month for the white-way and \$48.35 for each lamp per year. \$175.00 for the entire white-way. The company installs the lamps and furnishes the wires and poles to perform that service. The N. C. Public Service Co. owes the City of

High Point a balance on street assessment of about \$68,000. This pavement was completed in 1918. They have 10 years to pay it. They have been paid \$7,000 on it. There are a few months in arrears and are paying \$1,000.00 a month now on it.

Cross-examination:

The Public Service Co. were to pay these assessments like any other property owner. They gave their ten-year note. We have the same contract with the other citizens. The Public Service Co. have about 4½ miles of street railway in High Point and are rendering satisfactory service to the city. Under our contract with the Public Service Co. we have the right to string our wires on any poles they have in the city. They have something like 1,700 poles. There is a great deal of loss in the current from stepping it down from larger voltage to distribute it in the houses to smaller lights. We do not pay anything to the N. C. Public Service Co. for the use of those poles.

Redirect examination by defendant:

We own our transformers. The city does the stepping down. We take advantage of the discount allowed by the Public Service Co. by paying their bills on the 10th day of each month.

V. M. MORRIS, witness for defendant, testified as follows:

I am City Clerk of the City of Greensboro. I examined the records showing the indebtedness of the North Carolina Public Service to the City of Greensboro. They are indebted to the city now, I reckon you would say, \$14,000.00. There is \$12,726.23, I am just adding interest. There is about \$2,000.00 back taxes. On this street assessment I would say there is due about \$6,000.00.

Defendant offers in evidence contract for repaving certain streets of the City of High Point, dated July 9, 1919, marked "Defendant's Exhibit 31."

199 Witness cross-examined by plaintiff:

The city has not begun the paving of those streets. The \$14,000 you speak of was on street paving or assessments along the line of their street car tracks. And that is all the obligations they owe for street car extensions and paving in the City of Greensboro. They have paid all the balance. They have paid a great deal of money on street paving.

G. C. HOWARD, witness for defendant, testified as follows:

I am employed by the Southern Power Company at High Point; in charge of its substation there. I have had the substation under charge for eight years or more. The Southern Power Company de-

livers current to the N. C. Public Service Company just outside of the wall of the Southern Power Co. substation.

Q. Do you know where the N. C. Public Service Co. delivers to the town of High Point the electricity which the town distributes to its inhabitants for lighting purposes?

A. The Public Service delivers it to the city at the North Carolina Public Service substation.

Q. How far is that from the Southern Power Co. substation?

A. About a mile.

Q. Does the N. C. Public Service Co. perform any service to the city in connection with the electricity which it delivers to the city for retailing by the city to local users other than transmitting it from their substation to the N. C. Public Service Co. substation?

A. Nothing until it gets there.

Q. When it gets to the substation do they transform it in any way before delivering it to the town?

A. No way at all except it goes through automatic circuit breaker.

Q. What is the purpose of that?

A. In case the city line gets down, this switch, circuit breaker, would drop out automatically.

Q. That would cut the power out in case of any accident on the city's lines?

A. Yes, sir.

Q. So the only thing the N. C. Public Service Co. does
200 between the time you deliver the electricity to the Service Co. and the delivery of the electricity by the Service Co. to the town is simply to run it over the N. C. Public Service Co. wire for this mile between the two substations?

A. I had better explain right there. They have a regulator, but this regulator has not been used in years now.

Q. They used to use it?

A. Yes, sir.

Q. How long has it been since they regulated it?

A. I cannot tell you that.

Q. Do you know whether the N. C. Public Service Co. is extending its lines beyond the city limits of High Point?

A. Yes, sir.

Q. State what it is doing in that respect?

A. It is extending it to factories on the outside of the city limits.

Q. How far?

A. In the neighborhood of half a mile in some places.

Q. Name the factories to which it is extending its lines outside of the city limits?

A. Moffitt Underwear Co.

Q. How far is that from the city limits?

A. Between a fourth and a half.

Q. Any other factory?

A. Keystone Cabinet Co.

Q. How far is that beyond the city limits?

A. Several hundred yards.

Q. Do you know whether the N. C. Public Service Co. extended its lines to the Moffitt Underwear Co?

A. Yes, I would say about 1918 or 1919.

Q. When did it extend its lines to this Keystone Co.?

A. About the same year.

Q. Is there any other factory to which it is extending its lines?

A. Perley A. Thompson Car Works.

Q. When did it extend its lines to that factory?

A. About the same year.

Q. Is it extending its lines for the purpose of doing any lighting business beyond the city limits?

A. I have been asked to figure on the line, what it would cost.

Q. By whom were you asked to figure on the line?

A. Mr. Willard, that was taking stock in the line.

Q. In what line was he taking stock?

A. The line that goes out to Oak Hill school building and church.

Q. How far is that beyond High Point?

A. About half a mile or more.

201 Q. Do you know of any other line that it is preparing to make an extension of beyond High Point?

A. There is a company formed in Archdale.

Plaintiff objects.

Q. Do you know of your own knowledge of any connection between the N. C. Public Service Co. and this company that is being formed in Archdale?

A. Nothing only what I have been asked.

Q. Who asked you?

A. Mr. English at Archdale.

Q. Did Melton-Rhodes Co. make any application to you for power?

A. Yes, they told me they would like to get current from the Southern Power Co. and asked me to work it up for them.

Q. When did they do that?

A. In 1920.

Q. What time during 1920?

A. I would say April or May whey they spoke to me about it, or maybe earlier.

Q. How much power does the Melton-Rhodes Co. use in its factory?

A. They have motors rated at 190 horse power in service and there is to be installed I would say from 50 to 75 horse power.

Q. What is the character of business this Melton-Rhodes Co. does?

A. The business they are in now is office fixtures, filing cabinets, book cases.

Q. How close is that company to your substation?

A. Just a fence between us.

Q. Would you have to go along any city street or over any public walk or property at all to get to them and furnish them?

A. No, sir.

- Q. Did you fill their application for power?
A. I advised them to take it up with Mr. Fox.
Q. Do you know whether the Southern Power Co. is supplying them with power today?
A. They are not.
Q. Do you know who is?
A. The N. C. Public Service Co.
Q. Do you know anything about other applications that have been made to the Southern Power Co. by factories and other prospective users of power in and around High Point?
A. One for the Highland Cotton Mills, a new mill.
Q. Did they make an application to you for power?
A. They talked to me about it.
202 Q. When was that?
A. That was some time last year.
Q. Do you know how much power they wanted?
A. No, sir, I do not.
Q. How big a mill is it?
A. It is a small cotton mill, yarn mill.
Q. Did you supply them with the power they called for?
A. No, sir.
Q. What did you do in response to their application to you for power?
A. Told them to take it up with the Southern Power Co., and they said they had already done taken it up with them and they had turned them down, that they had sold up all they could spare.
Q. Is the Southern Power Co. furnishing them with electricity?
A. No, sir, not the new mill.
Q. Has the Pickett Mill made any application to you for power?
A. They have talked to me about power for the new development they built on to the cotton mill.
Q. How close is the Pickett Mill to your station?
A. It is several hundred yards.
Q. How much power have they asked for?
A. They didn't name any amount. They were having trouble trying to get power, and didn't know whether they were going to get it or not, and the last talk I had they said they hadn't got it.
Q. Can you name any other application made to you for power in High Point?
A. No, sir, I do not know as I can.

Cross-examination by plaintiff:

The Public Service Co. is not serving the Highland Mills nor the Picket Mills. The Melton-Rhodes concern is inside of the town of High Point. They are occupying the building formerly occupied by the Southern Car Works. The Southern Car Co. was furnished electrical current by the N. C. Public Service Co. The Public Service Co. connections were not inside that building at the time the Melton-Rhodes Co. moved into there. Both of us were right up there. We are not serving anybody anywhere in High Point or

around there that wants 200 horse power, except the N. C. Public Service Company. We have three customers at High Point, the N. C. Public Service Co., the Pickett Cotton Mills and Highland Cotton Mill. I tried to get Melton-Rhodes myself. The voltage used in furnishing the Pickett Mills and Highland Mills is 2,300 volts.

Q. Did you ever try anywhere during all the years you have been there to get any customer to use 50 or 100 or 200 horse power outside of High Point?

A. No, sir, they never applied to me.

Q. And you never tried to get it?

A. No, sir, I am not in that business.

The Public Service Company is furnishing the factories and mills inside High Point. The Melton-Rhodes Co. used to be in Greensboro.

Redirect examination:

It is not my business to go out and get applications for power. I simply run the substation. The sale of power is handled altogether through a different department from this.

J. W. MATTHEWS, witness for defendant, testified as follows:

I am employed by the Southern Power Co. as division superintendent at Greensboro. Have been employed in that capacity about 2½ years. I know something about the extension of the Public Service Company's lines beyond the limits of the City of Greensboro. Southeast of the town they go to Armour, American Agricultural Chemical Co. and Swift. Armour is about three miles, I would say, from the center. That is their factory; about two miles from the corporate limits. Armour has 545 connected horse power in their motor. If those motors were in operation they would use something like 140,000 or 150,000 kilowatt hours. Their lines extend to Swift's plant. This is about 2½ miles from the City of Greensboro. Swift has 307 horse power connected in motors. Running 24 hours, which I should have stated in the other, would be 130,000 kwh. They extend to the American Agricultural Chemical Co. That is the same as Armour and Swift, fertilizer business. They have 429 horse power connected in motors. They could use practically 130 to 140 or 150 thousand. They would have to run night and day to make 150,000 kwh. in a month. They furnish power to the Pomona yards outside the city limits. This is 2½ to 3 miles outside the city limits. The Southern Railway has 115 horse power connected in motors and 310 kilowatt transformers for lighting. They could use about 210,000 if they were to run straight. That is if they run 24 hours with full load of what equipment they have out there. I do not recall any other plant to which their lines extend. They have a lighting line which goes out on the Battleground road about three-fourths of a mile from the city limits. Of course, I cannot say how many cus-

tomers they have on that line, either lighting or power. They have a lighting line out on the Winston road 4 or 5 miles. They have no other lighting line beyond the city limits that I know of. I do not know of any preparations they are making to extend the lines beyond the city limits.

Cross-examination by plaintiff:

The line spoken of — the Armour Mills is owned by the Public Service Co. They built their transformers next to our substation. They now join the substation. They rest on a cement base on the floor, not connected to our building. It is visible, where anybody could see it. It has been there 2½ years and was built when I was there. From our substation to Armour's Mills is about 5 miles. I cannot say how much it would cost a mile to build this line. These mills have motors, and if they were all running all the time, 24 hours a day, it would take about as much kilowatt hours as I have mentioned. They were not running when I was out there. There are a lot of places closed down besides the fertilizer factory. I went out in the day time and none of them were doing anything.

The Public Service Co. is furnishing the Southern Railway Co. current at Pomona. They have 115 horse power in motors. The Southern Power Co. hasn't any line to any of these fertilizer factories nor to the Southern Railway Co. It hasn't any line to Guilford College, where the Public Service Co. are serving. I cannot say how many years the lines have extended to Guilford College. They have extended a little line to Boren and those people in the country try to get electricity to them. This is perfectly open and
205 apparent for anybody to see. We have no lines in the country. I have heard no effort on the part of the Southern Power Company to try to serve these people in this outlying territory. The only current the Southern Power Co. has sold all these years has been to the Public Service Co., the Cone Mills and the Pomona Mills. Those are all large plants. To the Pomona Mills our transmission lines carry 11,000 volts.

Defendant offers in evidence circular letter dated June 18, 1920, issued by the N. C. Public Service Co. to the citizens of Greensboro, and signed "North Carolina Public Service Co., C. B. Hole, President." Marked "Defendant's Exhibit 32."

Defendant offers in evidence circular letter dated June 16, 1920, issued to the citizens of Greensboro by the N. C. Public Service Co. from its general offices and signed "N. C. Public Service Co., Chas. B. Hole, President." Marked "Defendant's Exhibit 33."

Defendant offers in evidence letter dated June 16, 1920, signed "N. C. Public Service Co., Chas. B. Hole, President." Marked "Defendant's Exhibit 34."

Defendant offers in evidence letter dated June 17, 1920, signed "N. C. Public Service Co., Chas. B. Hole, President." Marked "Defendant's Exhibit 35."

V. B. NICHOLSON, witness for defendant, testified:

I am connected with the Greensboro Daily News, bookkeeper in the advertising department. I have in my hand a bound volume of the papers during the months marked on the back. Our paper circulates among the people of Greensboro. The N. C. Public Service Co. published in our paper on May 6, 1920, the following advertisement, hereto attached as an exhibit.

Copy of advertisement of June 27, 1920, hereto attached, was identified and introduced.

The Southern Power Company published some paid advertisements during this campaign.

206 Defendant offered in evidence paragraphs 4 and 5 of the replication filed by plaintiffs and against defendant in the Salisbury suit, as follows:

"4. That replying to the allegations contained in paragraph twelve of the answer, and particularly defendant's averments as to why it is increasing the rate charged these plaintiffs, and its justification therefor, which it alleges to be as follows: "which increased rate was absolutely necessary to enable the defendant to earn any income from its capital invested in its hydro-electric power plan," plaintiffs deny that the defendant's increased and discriminatory charge for current is either just to the consuming public or necessary to the defendant in order that it may earn "any income" or a reasonable income on the capital actually invested in its property which is devoted to the public use. On the contrary, plaintiffs upon information and belief aver the facts to be as follows:

The Southern Power Company was incorporated in New Jersey on June 22, 1905, and its promoters, J. B. Duke, W. S. Lee, W. Gill Wylie, and a few other gentlemen, organized and began the defendant company's development in North and South Carolina. It acquired certain water rights and built power plants on the Catawba and Broad Rivers in South Carolina capable of developing a rated capacity of 88,000 horse power, and also built transmission lines, as set out in the complaint with substations, etc. After this development was made the promoters of the defendant company organized another corporation, known as the Grear Falls Power Company, which was incorporated under the laws of New Jersey on November 6, 1909, and as owners of the Southern Power Company on or about March 1, 1910, sold to themselves as owners of the Great Falls Power Company the three hydro-electric power plants which had been erected by the Southern Power Company. To take care of the cost of developing this property the owners and promoters of the defendant Power Company placed a mortgage upon same in the sum of \$10,000,000, \$7,000,000 of which have been sold, which as plaintiffs are advised and believe was substantially the actual cost of the property purchased and developed.

207 That in addition to this bonded indebtedness, they issued unto themselves \$6,000,000 of 7% cumulative preferred stock and \$4,000,000 of common stock. That the same in-

terests, and substantially the same gentlemen, in organizing the Great Falls Power Company as the holding company for the hydro-electric generating properties, dams, etc., took over this part of the buildings of the defendant company, and executed back a contract at the same time, which provided that the Great Falls Power Company should furnish its hydro-electric current to the defendant for a long term of years at the rate of four mills per kilowatt hour; that as a part of this transaction the defendant company guaranteed to hold the Great Falls Power Company, free and clear of any liability under the mortgage; that the defendant company acting for itself and the same interests also acting for the Great Falls Power Company, had the Great Falls Power Company to issue \$5,768,800 of 7% cumulative preferred stock, and also \$5,768,800 common stock, which said stock was substantially all turned over to the defendant company and its promoters, who now own the same. That about June 11, 1915, the defendant company offered for sale in the City of New York, through the National City Bank of New York, the \$7,000,000 of bonds, secured by first mortgage upon defendant's property; that the vice-president of the defendant company, W. S. Lee, who is also the vice-president of the Great Falls Power Company, stated in a public letter, which was published as of that date in a circular by the National City Bank, that the earnings of the defendant company as officially reported for the year ending April 30, 1915, were as follows:

Gross receipts	\$2,485,789.79
Operating expenses (including taxes and rentals)	1,111,016.97
	<hr/>
Net earnings	\$1,374,772.82
Annual bonded indebtedness	350,000.00
	<hr/>
Balance	\$1,024,772.82

And immediately following, this statement was made:

208 "The net earnings for the year ending April 30, 1915, were almost four times the interest requirements of the \$7,000,000 first mortgage bonds which will shortly be outstanding."

Plaintiffs are advised that the company's gross earnings in 1917 had greatly increased over the earnings above stated to an amount in excess of \$1,000,000, while the interest paid on bonded indebtedness had not increased at all; that from the defendant's statement as of 1915, the year following the beginning of the world war, its net profits applicable to dividends were over \$1,000,000. After paying 7% on the \$6,000,000 cumulative preferred stock, \$420,000, there would still be left as applicable to the \$4,000,000 of common stock \$604,000, or an amount in excess of 15%. Plaintiffs are not advised as to how much dividends the defendant's stock in its holding company, the Great Falls Power Company, is earning at selling to itself hydro-electric current at four mills per kilowatt hour, but since de-

defendants in their answer herein filed have manifested the commendable disposition to furnish the Court with copies of its rate of schedules and that of the Southern Public Utilities, so that the Court may get all the facts, we respectfully request that the defendant furnish the Court a financial statement of the Great Falls Power Company for the year- 1914, 1915, 1916 and 1917, covering the world war period, so that the Court may see how much dividends were earned on its \$11,537,600 of preferred and common stock by selling hydro-electric current to the defendant company at four mills per kilowatt hour, and that the Court may determine whether or not the defendant's statement that the "increased rate was absolutely necessary to enable the defendant to earn any income from its capital invested in its hydro-electric power plants" devoted to the public use. The plaintiffs expressly disclaim any wish or desire to have the Court require the defendant to furnish it power at a rate more favorable than that charged to other like consumers under the same or substantially similar conditions, or that the Court shall fix the defendant's schedule of rates; but it does insist upon its legal rights, and requests the Court to prevent the defendant from discriminating unjustly against them in its charge for service, and insists that if necessary to increase the rates to earn a proper return upon its investments that it should not show partiality, but treat all alike. The plaintiffs, however, aver that it is not necessary that rates should be increased, or that any consumer should be discriminated against, in order that the defendant may earn a proper return upon its capital invested, and begs to suggest to the Court that the flow of water down the defendant's streams would have been sufficient to generate enough current to earn a proper and adequate dividend upon the money actually invested, without resorting to discrimination. If so much "water" had not been diverted into the capital stock of the defendant and its holding company, the Great Falls Power Company. That the Great Falls Power Company and the defendant company are each officers by the same persons, as follows: J. B. Duke, President, W. S. Lee, Vice-President, W. C. Porter, Secretary and Treasurer, E. C. Marshall, Assistant Secretary, and W. H. Martin, Assistant Treasurer.

5. That in replying to defendant's statement in paragraph thirteen of its answer that "it became necessary for the defendant to charge plaintiffs approximately the actual cost of generating said power, because the defendant in the absence of a contract could not afford to furnish power to the plaintiff for less than it cost to produce same," etc., the plaintiffs deny that it cost the defendant 1.88c. to generate electric power either by steam or water, and that a modern up-to-date steam plant under normal conditions can and does generate electric power at less than one cent per kilowatt hour."

Defendant also offered in evidence the following portion of brief of plaintiff in the Salisbury case, beginning at last line on Page 15 of said brief, and ending with the words "Municipal franchises," on said page 18, said excerpt being as follows:

"The same master mind, J. B. Duke, who conceived and is now carrying out this design of hydro-electric monopoly and extermina-

tion of all industrial competition and independence, both with relation to the wholesale and retail market, is the same master mind that conceived and operated a similar unlawful combination in
210 restraint of trade and in violation of law through the American Tobacco Company. The case of *United States v. American Tobacco Company*, decided by the Supreme Court of the United States, and reported in 55 Law Ed., at page 694, et seq., was decided at the October term, 1910, several years after the President of the defendant company had organized his power monopoly through the defendant in North Carolina. Having succeeded with the American Tobacco Trust, he naturally, as the record discloses, employed the same unfair methods to establish this water power monopoly that he had employed in the tobacco business. Reference to the opinion of Chief Justice White in that case shows a deadly parallel both in conception and in execution of the means employed and the ends to be accomplished. In addition, it will be observed that the Supreme Court of the United States held that J. B. Duke, President of the Tobacco Trust, was individually responsible along with the Corporation for the crimes committed by that concern. The court in its opinion, speaking of the unlawful practices in that case, says that its illegal purposes were overwhelmingly established by many facts, among others, "by the everpresent manifestation which is exhibited of a conscious wrong-doing by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another, or in several, so as to obscure the result actually attained, nevertheless uniform in their manifestations of the purpose to restrain others, and to monopolize and retain power in the hands of the few, who, it would seem, from the beginning contemplated the mastery of the trade, which practically follows. By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations, serving as perpetual barriers to the entry of others in the tobacco trade."

The Court further says of this combination and monopoly:

211 "The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence, from the beginning, of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade, by driving competitors out of business, which were ruthlessly carried out, upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible."

Look at the story of high finance and monopoly in record of the same J. B. Duke, as disclosed by the undisputed facts of this record. In 1905 he and his associates incorporated the defendant company in the State of New Jersey, where trust breeding powers were easily obtained (the same State in which he had secured a charter for the

American Tobacco Company and a number of its satellites). The defendant company then acquired water rights and built power plants on the Catawba and Broad Rivers in South Carolina. After this development was made the same J. B. Duke and associated organized the Great Falls Power Company, which was likewise incorporated under the laws of New Jersey in 1907, and as owners of the Southern Power Company on March 1, 1910, sold to themselves as owners of the Great Falls Power Company the three hydro-electric plants which had been erected by the Southern Power Company. To take care of the cost of developing this property the owners and promoters of the defendant power company placed a mortgage upon same in the sum of \$10,000,000, which was substantially the actual cost of the property purchased and developed. In addition to this bonded indebtedness, they issued to themselves \$6,000,000 of 7 per cent cumulative preferred stock and \$4,000,000 of common stock, and that the same interests and substantially the same gentlemen in organizing the Great Falls Power Company as the holding company for the hydro-electric generating properties took over this part of the defendant company and immediately executed back a contract which provided that the Great Falls Power Company should furnish its hydro-electric current to the defendant for a long term of years at the rate of four mills per K. w. h. The defendant company and its promoters, acting for themselves and for the Great Falls Power Company, had the latter company to issue \$5,768,800 of 7 per cent cumulative preferred stock, and also \$5,768,800 common stock, which said stock was substantially all turned over to the defendant company and its promoters, who now own same. Thereafter the same J. B. Duke and associates organized a subsidiary and retail company, known as the Southern Public Utilities Company, which is principally owned by himself and immediate family, and controlled by him. This company acquired a monopoly of the retail business in Charlotte, Winston-Salem and Reidsville. Thus these two institutions under the same control monopolized the wholesale supply of current and the retail distribution of the same *whatever* the subsidiary company could get control of the municipal franchises."

Defendant offers in evidence the follows:

Certified copy of the charter of the Southern Power Co., together with certificate of the Secretary of State of North Carolina, showing domestication in North Carolina.

Marked "Defendant's Exhibit 36," hereto attached.

Contract between the Southern Power Co. and the Leaksville Light & Power Co., dated July 12, 1916, formal proof of which is waived.

Marked "Defendant's Exhibit 37," hereto attached.

Contract dated May 1st, 1916, between Power & Light Co. and the Southern Power Co., proof of formal execution of same being waived by plaintiffs.

Marked "Defendant's Exhibit 38," hereto attached.

Contract dated April 12, 1916, between Southern Power Co. and the Hillsboro Power & Light Co., formal proof of execution of same being waived by plaintiff.

Marked "Defendant's Exhibit 39," hereto attached.

Contract dated May 8, 1917, between Southern Power Co. and the Hillsboro Light & Power Co., which is a contract supplemental
213 to the original contract between these two companies, dated April 12, 1916, formal exception of which is waived.

Marked "Defendant's Exhibit 40," hereto attached.

Supplemental contract between Southern Power Co. and Norwood Power & Light Co., dated Dec. 1, 1919, formal exception of which is waived.

Marked "Defendant's Exhibit 41," hereto attached.

Contract dated Dec. 31, 1915, between Southern Power Co. and Piedmont Railway & Electric Co.

Marked "Defendant's Exhibit 42," hereto attached.

Supplemental contract dated May 31, 1917, between Southern Power Co. and Piedmont Railway & Electric Co.

Marked "Defendant's Exhibit 43," hereto attached.

Contract dated July 1, 1914, between the Southern Power Co. and the Piedmont & Northern Railway Co., for the term of 20 years from and after the 1st day of July, 1914.

Marked "Defendant's Exhibit 44," hereto attached.

Supplemental contract between the Southern Power Co. and Piedmont & Northern Railway Co., dated Jan. 1st, 1916.

Marked "Defendant's Exhibit 45," hereto attached.

Supplemental contract between Southern Power Co., and Piedmont & Northern Railway Co., dated Jan. 1st, 1915.

Marked "Defendant's Exhibit 46," hereto attached.

The plaintiff offered in evidence allegation 15 of the complaint in the case of Salisbury and Spencer Railroad Co. vs. Southern Power Company, which case is pending in the Superior Court of Guilford County, as follows:

"That the said J. B. Duke, President of defendant Company, as aforesaid, as plaintiffs are advised and believe, is the principal owner, either directly or indirectly through his immediate family, of a subsidiary corporation of the Southern Power Company,
214 known as the Southern Public Utilities Company, which last named Company in turn owns the Public Utility franchises in Charlotte, Winston-Salem, Reidsville, and other towns and cities, and is now engaged in furnishing hydro-electric power and light to these municipalities which it purchases from the defendant Power Company; that the defendant Power Company, acting by and under the influence of the said J. B. Duke, and in his interest, is furnishing power to this Utility Company at each of its stations in Charlotte, Winston-Salem and Reidsville, under a long term contract extending to 1944, and at a less rate than it now charges

and proposes to charge the plaintiffs for current furnished for like service under substantially similar conditions at its substation near Salisbury."

Plaintiff also offered paragraph 15 of defendant's answer in said suit, as follows:

"That replying to article fifteen of the complaint it is admitted that J. B. Duke is interested in the Southern Public Utilities Company, which holds its franchises in the cities referred to in said article of the complaint, and in other cities and towns, and is engaged in furnishing light and power to said cities which it purchases from the defendant company. It is admitted that the power company is furnishing power and current to said Southern Public Utilities Company for the cities and town- in which it operates except the town of Reidsville under a long term contract extending to 1944. That the contract between the defendant Power Company and said Southern Public Utilities Company for power and current which the latter furnishes to certain of the cities and towns in which it operates was made several years ago and prior to the power Company's increase in its rates on December 5, 1917. That in said contract it is expressly provided that for any additional power which the Utilities Company may acquire from the Power Company it shall pay the prevailing rate at the time of acquiring such power; that since the Power Company's increase in rates of December 5, 1917, said Utilities Company has entered into a contract for a period of ten years with the Power Company for furnishing it power for the Town of Reidsville, and the rate fixed in 215 said contract and at which the Utilities Company is paying the Power Company for such power, is the increased rate of December 5, 1917; that the rate and term of said contract are identically the same as those offered the plaintiff Public Service Company in August, 1918, and the same rate and terms upon which the Power Company has since entered into other contracts with cities and towns, to-wit, with the towns of Lincolnton, Shelby and Newton, N. C., and it has since said increase in rates made no contract with any other city or town of Public Service Company upon any other or different rate, or upon other or different terms. That the rate and terms offered the plaintiff Public Service Company in August, 1917, prior to the increased rate in December, 1917, were the same as those contained in the contract then existing between the defendant and said Southern Public Utilities Company. The defendant Power Company further avers that the contract which it proposed to make with the Public Service Company contained a provision that said company would be charge a flat rate of 1.2c per kilowatt hour for the power consumed by any one customer who would take the regularity as much as 5,000 kilowatt hours per month, which provision is one regularly contained in contained in contracts entered into by the defendants with cities and towns and other public service corporations. That except as herein expressly admitted the allegations of article fifteen of the complaint are untrue and denied."

Plaintiff offered in evidence statement in the official report of the proceedings before the Corporation made by Mr. Robinson, counsel representing the Southern Power Company, as follows:

"We offer that, may it please your Honors, because we propose to show now only that the plants are operated as unified systems, but we propose to show further that by doing so all the plants are operated more economically and more effectively, and then that also has this bearing upon the lease. The lease was for the term of ten years. Some question has been raised that if there were 99 years they would stand before this court upon a different footing.

We propose to show that the identity of the stockholders are the sam-
216 companies, practically identically the same in all these companies, so that it would be very easy for the Southern Power Company to get a lease for 99 years or 999 years. That lease would be voted by the stockholders, and as a matter of fact we propose to show by Mr. Lee that these different corporations are simply a matter of form adopted for reasons which the owners thought advisable in financing the property. That when you come down to the substance and get behind the form and undertake to ascertain what property we have got here which is devoted to serving the public, that in effect that property is all owned by the same interest and all operated together and as to this matter of lease, whether they charge four or five or six mills, that that is simply a matter of taking money from one pocket and putting it in the other, and it makes no difference whatever in the finality of these cases."

Defendant's Exhibit No. 1.

Agreement Between Southern Power Co. and High Point Electric Co., Dated Nov. 21, 1908.

STATE OF NORTH CAROLINA,
County of Mecklenberg:

Memorandum of agreement, made and entered into this 21st day of November, 1908, by and between the Southern Power Company a corporation organized under the laws of the State of New Jersey, party of the first party, hereinafter designated as and called the "Power Company," and the High Point Electric Power Company, a corporation organized under the laws of the State of North Carolina, party of the second part, hereinafter designated as and called the "Consumer," witnesseth:

That in consideration of the mutual covenants and agreements hereinafter contained, the expected performance thereof, and the electric power to be deliver-d, the sums of money to be paid, and other valuable considerations, the parties hereto for themselves, their successors and assigns have mutually agreed and do agree with each other as follows:

217 First. Said Power Company agrees that it will deliver to said Consumer electric power or electricity and said Consumer agrees to receive, use and pay for said electric power or electricity, at

the time and the place or places and for the purposes, and in the amounts, and in the manner and in accordance with the terms, limitations and conditions hereinafter set forth, for and during, and this contract shall continue in force for the term of ten (10) years from the date or day on which the delivering of such electric power or electricity hereunder is and shall be actually begun.

Second. The electric power or electricity to be supplied hereunder shall be three-phase alternating and at approximately sixty cycles per second, and at a voltage to be determined upon by said Power Company and at approximately 2,200 volts; and said electric power shall be delivered by said Power Company to said Consumer at a terminal or delivery point located in the transformer station of said Power Company within or near the incorporate limits of the City of High Point, County of Guilford, State of North Carolina, said station to be located on a site to be selected by the parties hereto and approved of by said Power Company. Said Power Company will locate said station within the corporate limits of said City of High Point if it can obtain from said City a reasonable franchise and permission to maintain its station and transmission lines within such incorporate limits; otherwise, said station will be located without the incorporate limits of said City. Said Consumer agrees that it will look after the operation of said transformer station at its own cost and expense. And said electricity shall be so delivered and furnished hereunder twenty-four (24) hours per day, Sundays during daylight being excepted.

Third. Said Consumer agrees that it will pay for all electric power under this contract at the rate of one and thirty-five one-hundredths (135 cts.) cents per Kilo Watt hour. The maximum amount of electric power which said Power Company can be required to deliver at any one time under this contract is 1,200 Kilo Watts. The payment for said electric power, and any, all and every payment under this contract shall be made at the office of said Power Company, located at Charlotte, Mecklenburg County, North Carolina. Bills showing amounts of power shall be rendered each

218 month by said Power Company to said Consumer for the installment or other charge due for the delivery of said electric power during the preceding month; and each, every and all of such bills shall be payable by said Consumer at the said office of said Power Company on or before the 15th day of each and every month immediately succeeding or following that month in which said electric power shall have been delivered, during the full term of this contract.

Fourth. Said electricity or electric power delivered hereunder by said Power Company to said Consumer is and shall be so delivered for the purpose of its being used, sold or applied by said Consumer for the purpose of its being sold or used in lighting the streets of said City and the public and private buildings therein, and for furnishing electric light or electricity for lighting, heating and motive power to said City, and its inhabitants and the inhabitants in the vicinity thereof. And said Consumer agrees to dismantle its present steam plant, and for the purpose of fixing the amount of power that said Consumer will take from said Power Company, said Consumer will take from said Power Company all necessary power

to be by it used, sold or applied for the purposes in this paragraph mentioned. All contracts made by said Consumer for such retailing of said electric power shall be subject to this contract, and the liability of the Power Company for any purpose shall not be construed to extend to any other person or corporation other than the said Consumer. And said Consumer is not permitted to and hereby agrees not to use, employ, consume, apply, sell, or retail said electric power delivered hereunder or any part thereof, in any place or places, or in any manner, or for any purpose or purposes other than are provided for in this contract.

Fifth. Said Power Company agrees that it will begin to deliver said electric power on or before the 1st day of July, 1909, or be ready, willing and able so to do, and said Consumer agrees that it
219 will receive said electric power or be ready, willing and able so to do on or before the 1st day of July, 1909. And each party hereto agrees to notify the other party as soon as such party is ready, willing and able to perform its agreement in this paragraph contained. And in case either party hereto is delayed in or prevented from performing or carrying out the agreements, covenants and obligations made by and imposed upon said parties, or either of them, by this paragraph, by reason of or through strike, stoppage of labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any court or judge granted in any bona fide adverse legal proceeding or action, order of any civil authority, explosion, act of God or of the public enemies, or any case reasonably beyond its control and not attributable to its neglect, then and in such case such period of delay or prevention shall not be reckoned or accounted as a part of the time within which said party was to so perform and carry out the same, and the days, dates, times and periods, mentioned in this paragraph, shall be extended for a period proportionate to such delay or prevention; provided, however, that the party or parties suffering such delay or prevention shall use all reasonable diligence to remove the cause or causes thereof and either party shall give to the other written notice for such extension.

Sixth. Neither party hereto shall be responsible for accident or for injury or damage to the machinery, apparatus, appliances, or other property of the one, caused by lighting, defects in or a failure of the machinery, apparatus, or appliances of the other; and it is expressly understood and agreed that said Power Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for and that said Power Company shall not be in any way responsible for the transmission or control of said electric power or current beyond such point of its delivery to said Consumer, and shall not, in any event, be liable for damage, or injury to any person or property whatsoever, arising, accruing or resulting from, in any manner, the receiving, use, consumption, application or distribution by said Consumer of said electric power, and said Consumer shall

220 hold and save harmless the Power Company from any and all liability or liabilities to any person incurred or sustained by said Power Company by reason thereof or of any negligence

or misconduct on the part of said Consumer, its officers, agents, servants, or employees.

Seventh. The furnishing, supplying and delivering by said Power Company of said electric power and the receiving, using, consuming and applying thereof, and payment therefor, by said Consumer, is and shall be subject to and in accordance with following rules and regulations, which shall be deemed and taken to be and are hereby made a part of this contract, to-wit:

(A) For the purpose of ascertaining the amount of electric power being supplied under this contract, said Power Company may place and install at said transformer station and connect in circuit at the terminals of its power lines (said terminals to be established as hereinbefore provided for), such watt-meter or meters as in the opinion of said Power Company, may or shall be necessary to measure and record the said electric power being supplied under this contract, and said meters shall be kept accurate by and shall be the property of said Power Company, and their record shall be final in determining the amount of power used by said Consumer hereunder; said meters shall be at all times, upon the written request of said Consumer, subject to such standard tests as may be necessary to establish their accuracy, and said Consumer shall under no circumstances interfere with said meters, but in case of defective or unsatisfactory service, said Consumer shall immediately give written notice thereof to said Power Company, said Meters shall be provided, installed and kept in good repair by said Power Company, and the Power Company shall at all times have the right to inspect such meters, and if found to be defective, to repair or replace them at its option. And it is further understood and agreed that the said meter or meters may be read by the Power Company as often as either party hereto may deem advisable.

(B) The Power Company shall at its own cost and expense extend its power lines to the terminal or delivery point located and established as hereinbefore provided; and for that purpose said Consumer, in the event that said terminal or delivery point is on its premises, hereby gives and grants to said Power Company during the continuance of this contract, the necessary or convenient right of way with all incident privileges, over its premises whereon to erect and maintain said power line and terminal. Provided, that right of way shall follow as nearly as practicable a direct line from the point where it shall enter the premises of the Consumer to said terminal point as aforesaid, and any change in the location of either will be made by the Power Company upon the written and reasonable request of the Consumer, but the cost and expense of such change shall be borne by said Consumer. The mains of the Consumer shall connect to and with the mains of the Power Company at the said terminal point, and said Power Company shall make said connections and place upon the said premises of the Consumer all appliances necessary to make and maintain the same in proper condition; all appliances so furnished by the Power Company shall be and remain the property of and shall be maintained and kept in repair by said Power Company.

(C) Said Power Company shall provide a regular and uninter-

rupted power services, and said Consumer will regularly and continuously, receive, use and apply the same; but in case the service thereof shall be interrupted or suspended or fail, or in case said Consumer shall be prevented from receiving, using and applying said electric power by reason of or through strike, stoppage of labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any Court or Judge granted in any bona fide adverse legal proceeding or action, or any civil authority, explosion, Act of God or of the public enemies, or any cause reasonably beyond its control and not attributable to its neglect, then and in such event said Power Company shall not be obligated to deliver said electric power hereunder during such period, and shall not be liable for any damage or loss resulting from the interruption, prevention, suspension or failure, and said Consumer shall not be obligated or liable to pay for such power

222 not delivered, furnished or supplied during such period; and in any and all such event or events, the party suffering such interruption, prevention, suspension, or failure shall be prompt and diligent in removing and overcoming such cause or causes thereof; provided, however, that either party whose plant shall suspend operation by reason of accident to its machinery, plant or system, shall proceed at once to repair the same within a reasonable time, and failing so to do, the limit of or exemption from liability as fixed in this paragraph shall not apply and the party shall be liable to the other as though no such limit or exemption had been fixed.

(D) The Power Company shall at all times during the continuance of this contract have the right of ingress to and egress from the premises of said Consumer for any and all rights secured to or the performance of any and all obligations imposed upon it by this contract.

(E) If default shall be made at any time by the Consumer in paying for the electric power delivered to it by the Power Company under and pursuant to the terms of this contract, and if such default shall continue for a period of twenty (20) days, then the Power Company shall have the right at its option, to terminate this contract, or, at its option, without terminating, or in anywise avoiding this contract, to discontinue, suspend and withdraw the delivery, furnishing or supplying electric power hereunder, until payment of all money due to it under the terms hereof from the Consumer shall have been made; This option may be exercised by the Power Company whenever, and as often as, any such default shall occur and continue for said period of twenty days, and delay or omission on the part of the Power Company to exercise such option at any time, shall not be deemed a waiver by it of its right to exercise such option whenever such default on the part of the Consumer shall occur. And said Consumer shall pay to said Power Company all loss and damage resulting to it from such suspension of delivery of power hereunder. And in the event of such default in payment, or at the termination or expiration of this contract, then it shall be lawful for and the said Consumer does hereby authorize, and em-

223 power the Power Company, its successors and assigns, officers, agents, or employees, with the aid and assistance of any person or persons to enter in and upon the said premises of said Consumer, and such other place or places whatsoever as or in which any meter, apparatus, appliances, fixtures, or other property of said Power Company is, are or may be, and remove, take and carry away the same.

(F) No change in, modification, alteration or enlargement of this contract shall be valid or binding unless endorsed hereon in writing at the time the same is made and signed by the Presidents of both parties hereto.

Tenth. This contract shall bind the parties hereto, and their successors and assigns.

Eleventh. This contract is not binding upon said Power Company until ratified and approved by its Board of Directors.

In witness whereof, on the day and year first above written, the parties hereto have thereunto cause this agreement to be signed in duplicate, and caused their respective corporate names to be subscribed and their corporate seals to be affixed hereto by their respective Presidents and attested by their respective Secretaries duly authorized by resolution duly adopted by their respective Boards of Directors. Southern Power Company, by W. Gill Wylie, President. Attest: R. B. Arrington, Secretary. (Seal Southern Power Co.) High Point Electric Power Company, by W. S. Thomson, President. Attest: O. N. Robinson, Secretary. (Seal High Point Electric Power Co.)

224 "Proposed contract, in duplicate, dated November 21st, 1908, with High Point Electric Power Company, a corporation of North Carolina, was presented to the meeting for ratification and instructions to the President and Secretary to execute on Southern Power Company's behalf, the same having already been executed by said High Point Company. Contract called for delivery to said High Point Company for ten years from date of commencement of delivery of power, of 24 hour power at 1.35c per kilowatt hour. It was resolved that the contract be entered into by the Southern Power Company as above, each party to it to have a copy.

I, R. B. Arrington, Secretary of Southern Power Company, do hereby certify that the above is a full, true and complete copy of a resolution of the Board of Directors of said Company duly passed at a meeting of said Board held in New York City on Dec. 7th, 1908, at which meeting a quorum was present; as taken from and compared with the original minutes of said meeting.

Witness my hand and the corporate seal of said Southern Power Company this 11th day of January, A. D. 1909. (Signed) R. B. Arrington, Secretary.

"Defendant's Exhibit 2."

Letter from High Point Electric Co. to Southern Power Co. Dated Feb. 11, 1908.

High Point Electric Power Co.

High Point, N. C., Feb. 11th, 1908.

Southern Power Co., Charlotte, N. C.

GENTLEMEN: Your favor of the 10th inst. to hand. As soon as Mr. W. S. Lee returns I will be glad to have you advise me and I will run over to see him. Would like to go to your City on 225 the afternoon cars that get in about five o'clock. Can meet him at his office or at the Hotel and go over our business and this will let me be at home early next morning.

We hope that it can be arranged for you to bring your power here. We can take your power into our plant and stop using our engines and can give you everything in this place needing Electric Power as soon as it can be placed here. We have contracts with our best customers and our Contract with the City runs two years yet.

We know that the Street Car people here, who are building a line, expect to get this City work later and in fact all of it. We believe you can get it all if you get here first. Hoping to hear from you in a few days and thanking you for your favors, I am, Yours truly,
O. N. Richardson, Secy. & Treas.

P. S. Enclose a list that may interest you. Will give you an idea of our little business. We give it to you and know that you will keep the information we give private. O. N. R.

"Defendant's Exhibit 3."

Letter from High Point Electric Co. to Southern Power Co. Dated Aug. 20, 1908.

High Point Electric Power Co.

High Point, N. C., Aug. 20th, 1908.

Southern Power Co., Charlotte, N. C.

DEAR SIR: I have Mr. Lee's letter this morning. I expect now to come over to see him Friday afternoon on No. 7.

If I cannot arrange to do this you can expect me Saturday. I hope, however, to see you tomorrow afternoon.

226 In past week there has been orders placed for five or six more motors from ten to fifty horse power placed and we will soon have as many as we can take care of. This means that we have either got to make a contract with you, or arrange to en-

large our present plant and be ready by January first to take care of new business. We do not see how we can delay this matter longer. You can contract with us and get all there is here whether you own a franchise or not, as we have it and you can tap us on the City line. I hope you will be ready to say what you can do for us tomorrow. Yours truly, O. N. Richardson.

"Defendant's Exhibit 4."

Letter from High Point Electric Co. to Southern Power Co. Dated Aug. 24, 1908.

High Point Electric Power Co.

High Point, N. C., August 24th, 1908.

Southern Power Co., Charlotte, N. C.

GENTLEMEN: Please do not overlook our matter at your directors' meeting tomorrow. We want to get the matter settled. There are a number of things we wish to do here if we do not get your power. We expect to bore a deep well and the party is now here to bore one for the Hosiery Mills, and it is money in our pocket to have ours done before he moves his machinery. There are several others things that we will do and must do if we do not get your power. On the other hand if we get it, we will not need them.

As stated to you a few days ago, we will sell in the next twelve months all of twenty five thousand dollars worth of power to the customers we now have and we do not know how many more we can add in that time. We have so far only worked the trade with customers who would have their fuel to buy. This leaves all of the thirty or forty more factories here that buy some coal but make most of their fuel, as shavings.

227 If we get your power we may be able to land every one of them, giving us a load of three to four thousand horsepower.

There are two men here who say they are going to build a Cotton Mill. Both are home men and could do so if they decided too. Mills with a capital of about two hundred thousand dollars each. Sooner or later we will have a Cotton Mill here, because we have very little work for the women and girls and we give about four thousand men and boys work. It is the best place today we know of for a mill. So much of the labor here now are wanting the work. The men in the furniture factories and the women in the mill. It will come before much longer.

I think we can form a Company, use our name if we wish too, and cut out our present plant and both make money out of it. If we can't do this we can work it out on the lines I mentioned to you. We are willing to do the right thing either way.

We will be very glad to settle this business this week. We know of course that you cannot get here for some time, but additions we would make if we continue we get along without if we have traded with you and know that some time in the next year we will

be furnished with your power. Trusting that you will give this matter your attention promptly, we are yours truly, O. N. Richardson, Secy.

P. S.—One of the Alderman says, so I understand that he is not willing to grant franchises to any one unless they agree to pay the City a commission on all business they do. If they get this into their heads they may get hung up over your franchise. I believe sooner or later they will grant it. However, we have a franchise and they can't come that over us. O. N. R.

"Defendant's Exhibit 5."

Letter from High Point Electric Co. to Southern Power Co., Dated Aug. 29, 1908.

228

High Point Electric Power Co.

High Point N. C., August 29th, 1908.

Southern Power Co., Charlotte, N. C.

DEAR SIR: We expected to have either heard from you or have had some one from your Company to see us this week. We see that your Mr. Lee has been to New York this week and this may be the reason we have not heard from you. We would like to settle this business and see what we can do.

We expect to sink a deep well to furnish our plant with water and the party we want to drill it has just moved his machinery here to sink one for the Hosiery Mills and it is much cheaper for us to have the work done now than it will be later. There are several other things that we will be forced to put in and quite a lot of work that we must do all of which we will not need if we cut out our steam plant and use your power. Even if we do not get it for six months or even longer, we can save some of this expense. If it does not suit you to see me early in the week here I can come down and see you. We will be very glad to get this matter shaped up next week and hope we can do this. Please answer promptly. Yours truly, O. N. Richardson, Secy.

"Defendant's Exhibit 6."

Letter from High Point Electric Co. to Southern Power Co., Dated Sept. 4, 1908.

High Point Electric Power Co.

High Point, N. C., Sept. 4th, 1908.

Mr. W. S. Lee, Southern Power Co., Charlotte, N. C.

229

DEAR SIR: I thank you for your letter this morning and note that as soon as Dr. Wylie gets down you will take my matter up and get it in definite shape.

I trust this will be in the next few days. Wire me and I will come down or you can take a day off and come and see me and what we have. I believe the right thing for both of us to do is to enter an agreement with us for all the power we can sell and let us give you the right amount you should have of the income from the power sold, we to push the sale of same and guarantee every bill and settle monthly. Then we can go ahead and take down our present plant and get back all the money we can from the sale of same.

However, it might be best to sell you a half interest in the business and then stop our plant and take in all the D. C. Motors and give them A. C. Make the best deal with each customer we can and change him and at same time bind him into a long contract with us.

I expected to be away a few days on a trip to Jacksonville, Fla., first of next week, but have today put this matter off until a week or more later and have written to my party to this effect.

With kind regards and hoping to hear from you very soon, I am, Yours truly, O. N. Richardson.

"Defendant's Exhibit 7."

Letter from High Point Electric Co. to Mr. W. S. Lee, Dated Oct. 6, 1908.

High Point Electric Power Co.

High Point, N. C., Oct. 6, 1908.

Mr. W. S. Lee, Charlotte, N. C.

DEAR SIR: Your letter received and I thank you for same, I am going away tonight to Savannah and Atlanta and will hardly be back before Saturday. Next week, however, I will try and
230 see you and go over this business. As stated we are anxious to know what we can do with you. If we know that we will have your power later on we will then be able to do or not do things here, provided we know about when we can expect to have the power delivered here.

As I understand your letter this morning you are willing to make a contract with us and furnish us all the power we can use and let us have the full control of your power in High Point with the exception of any Cotton Mills that may be here in the future. This is all-right with us. Don't ask for any better arrangement so far as this goes.

Now as to the price will say that I really don't know how much of our present income it will take to pay you for the power we are using at the price you name of 1.5c. per K. W. Hour.

If this price is right that will settle this part of it. Now as to how long a contract you will make with us will say that we will go over this also. You know of course if we use your power we can cut out our engines, boilers and in fact about every thing we have

except the Lines, Transformers and Meters. As soon as we can get off all the D. C. Motors, we will be in good shape to take down the Plant and sell off what we don't need.

We cannot do this unless we have a good long contract with you. Please think of these things and when I can get off I will do so and see you. I hope that these things can be arranged so that we can do away with our Steam Plant, and use your power entirely and some time next year get it down here. We would want to sell our machinery and take some of the money and buy in the old D. C. Motors and turn it all into A. C.

The Reading on the City meters last month gave us 223,500. The Const. says multiply by 100. This gives 22,350,000 Watts. This @ 1.5c. per K. W. Hour would cost us for your power \$335.25. Is this correct?

I don't know how to figure out these readings and am not sure that I can take a D. C. reading in Watt Hours and H. P. Hours and find just what power at your price will cost me.

One meter last month on one line gave us 619300 for the month of Sept. This was a D. C. Thomson Watt meter. On face of meter it says Watt Hours. How much would this cost me at your price?

231 Another D. C. Meter, same as above, gave us a reading of 183,200 & the Const. on this meter is 24. What would this cost me at your price?

We got the H. Pt. Hosiery Mills with six new motors started just before the month was out. Their Meter is a K. W. Hours on our A. C. Line. This meter read 44,100 with Const. 10. What would this cost me?

Some time this week I will thank you to have this figured out for me and mail the result and in fact the figures to me, if you please, so I can see what it would have cost me, if I were using your power.

As stated I will be out of town for next two days and if you will answer this letter I will have this information here when I return and will advise you when I can meet you in your office.

I am much pleased to know that you will give us this power and hope that it will not be a great while before we can be using it. I am willing if we can make a satisfactory contract with you to cut out the power plant here and turn it all into you, get back all I can out of our Investment of at least \$45,000.00.

Thanking you for your favors, I am, Yours truly, O. N. Richardson, Secy.

"Defendant's Exhibit 8."

Letter from High Point Electric Co. to Southern Power Co. Dated Oct. 10, 1908.

High Point Electric Power Co.

High Point, N. C., October 10th, 1908.

Southern Power Co., Charlotte, N. C.

GENTLEMEN: We are willing to make you the offer for your power named below. We are willing to enter into a Twenty Year Contract to use your power, dismantle our Steam Plant that has cost us over Forty Thousand Dollars, use your power entirely, 232 sell every horse power we can, guarantee every bill we make, settle with you once each month on any day you wish, allow you to retain the right to furnish power to any Cotton Mills that may be built inside of the City limits but we to control all other plants wanting power, give you the right to have our books examined each month or as often as you may wish to, and give you 60% of the gross income, provided the power is delivered to us at 2,300 volts or about that and either at the City limits or inside the City limits, and provided we can get our Franchise with the City extended when the time is out to cover the balance of this twenty years, as our Franchise does not run this long. This will leave us 40% of the gross income and from this we must take the money needed to pay all help and we figure this at all of Twenty-Five Hundred per year, buy and keep up all Lines, Transformers, Meters, tax and other expenses and when we do this we will have about 15% of this income left us as profit. We figure our gross income for the next twelve months at all of Twenty-Five Thousand Dollars.

The business is growing and in the next twelve months we will add many more customers. We hope to get the City Water Works, four miles from town. Can we furnish them with 100 to 150 horse power this distance from Transformer station without too much loss?

We will go after every thing here and land every thing possible on our line. We will let you figure out a schedule of prices for us to sell by. We will use money in demonstrating that electric power is the thing for them and we will get the most of them.

We will give the C-ty a good price on all they want for Lights and at the Water Station, and keep them from building the Plant they are now talking about. Their idea now and for some time has been to build a plant here next year and make power for the Water Station as well as Lights.

They will want quite a lot of power and we can give them a close price and stop this. And this matter should be arranged between us soon, so I will be in shape to meet them. I have found out that they are going to make me an offer after the year comes in and if I do not accept it, they will then build a plant. I have this straight and

233 this is their idea at present. Now then if you can do business with me and take 60% of the entire income we can do business. We will sign up with you and we will try and hold them down here with our present plant until you can get your power too us, which we hope can be done by next Summer.

A division of income in the above amounts between us I am very sure will pay you better than the offer you have made us and it is more satisfactory to us. After our contracts expire and they are ending all the time, we can put into force the new schedule you will help us make up and it will not be a great while until you will really have the making of the price for us to sell buy. We will buy in all the D. C. Equipment here from our customers and sell the A. C. and keep them in line and get the entire system on A. C. Lines.

If this town keeps on growing and the indications for it are as good as any town in the country, in a few more years we will have a great plant here. We have worked up a nice business, we are making money out of it and we are offering above all we can and we think giving you more of our income than you will get at the price you name. It is my faith in the future income that prompts me to make this offer. I shall be pleased to have your opinion in regard to this offer and hope you will answer me promptly. With regards,, I am, Yours truly, O. N. Richardson, Secy.

"Defendant's Exhibit 9."

Letter from High Point Electric Co. to Southern Power Co. Dated Oct. 20, 1908.

High Point Electric Power Co.

High Point, N. C., October 20th, 1908.

Southern Power Co., Charlotte, N. C.

234 DEAR SIR: In the offers in regard to the power business you made me yesterday you did not say how long a contract you were willing to make with us if we accepted your price of 1.5 cents per K. W. H.

I intended asking you this, but overlooked it. Please let me know how long you are willing to sign up for at this price, to give us control of the power in High Point with the exception of any Cotton Mills that may be built here.

You know if we accept this offer, we will want to take down and will do so, our steam plant, and get what cash we can out of it and pay up those bonds we owe. We cannot of course on a short contract agree to do this, but on a long one we can. We know this price is higher than if we sell you stock, but I built and sold engines and boilers for sixteen years and think I can get about as much cash out of our plant as anyone can and it may be better for us to defer selling you an interest for another year or more and go ahead and pay the 1.5 rate and start the business on new lines. We have fully de-

cided to turn it all into A. C. and get the old D. C. out of the way and will do this in a very short time after your power gets to us. We are unable to cut them out until your power is here. Then in sixty days we think we can do so.

I am inclined to think that it will be better for us to take the rate of 1.5 and start out on this line until we have disposed of our plant and then if it looks best go in with you on the other deal. In any event we will need your power and hope you will get it here by Spring. We want to do the business with you in the future and feel sure we can make you satisfactory customers. We could not sign up, however, and take down our plant unless we have a long contract with you.

We would not be willing to sign up for less than fifteen years and we would like to have the option of selling you stock in the future, after we have sold off our plant and really get ready. Please advise me promptly about this and we will settle on something at once. Yours truly, O. N. Richardson, Secy.

235

Defendant's Exhibit No. 10.

Agreement Between Southern Power Co. and Greensboro Electric Co., Dated Dec. 23, 1908.

STATE OF NORTH CAROLINA,
County of Mecklenburg:

Memorandum of agreement, made and entered into this 23rd day of December, 1908, by and between the Southern Power Company, a corporation organized under the laws of the State of New Jersey, party of the first part, hereinafter designated as and called the "Power Company," and the Greensboro Electric Company, a corporation organized under the laws of the State of North Carolina, party of the second part, hereinafter designated as and called the "Consumer," witnesseth:

That in consideration of the mutual covenants and agreements hereinafter contained, the expected performance thereof, the electric power to be delivered, the sums of money to be paid and other valuable consideration, the parties hereto, for themselves, their successors and assigns, have mutually agreed and do agree with each other as follows:

First. Said Power Company agrees that it will deliver to said Consumer electric power or electricity and said Consumer agrees to receive, use and pay for said electric power or electricity, at the time and the place or places and for the purposes, and in the amounts, and in the manner and in accordance with the terms, limitations and conditions hereinafter set forth, for and during, and this contract shall continue in force for the term of ten (10) years from the date or day on which the delivering of such power or electricity hereunder is and shall be actually begun.

Second. The electric power or electricity to be supplied hereunder shall be three-phase, alternating and at approximately 60 cycles per second and at a voltage to be determined upon by said Power Company and at approximately 2,200 volts; and said electric power shall be delivered by said Power Company to said Consumer at a terminal or delivery point located in the transformer station of said Power Company, within or near the incorporate limits of the City of Greensboro, County of Guilford, State of North Carolina, said station to be located on a site to be selected by the parties hereto and approved of by Power Company. Said Power Company will locate said station within the incorporate limits of the said City of Greensboro if it can obtain from said City a franchise satisfactory to itself and permission to maintain its station and transmission line within such incorporate limits; otherwise, said station will be located without the incorporate limits of said City. Said Consumer agrees that it will look after the operation of said transformer station at its own cost and expense. And said electricity shall be so delivered and furnished hereunder twenty-four (24) hours per day, Sundays during day-light being excepted.

Third. Said Consumer agrees that it will pay for all electric power under this contract at the rate of one and one-tenth (1.1) cents per Kilo-Watt hour for all electric power delivered monthly under this contract. The maximum amount of electric power which said Power Company can be required to deliver at any one time under this contract is 3,000 Kilo-Watts. The payment for said electric power and any and all and every payment under this contract shall be made at the office of the said Power Company, located at Charlotte, Mecklenburg County, North Carolina. Bills showing amounts of power shall be rendered each month by said Power Company to said Consumer for the delivery of such electric power during the preceding month, and each, every and all of such bills shall be payable by said Consumer at the said office of the said Power Company, on or before the 15th day of each and every month immediately succeeding or following that month in which said electricity shall have been delivered, during the full term of this contract.

Fourth. Said electricity or electric power delivered hereunder by said Power Company to said Consumer is and shall be so delivered for the purpose of its being used, sold or applied by said Consumer as a motive power for the operation of an electric railway system in and around the said City of Greensboro and vicinity, and for the operation of any railway system which may hereafter be built or constructed connecting the City of Greensboro with any other city, town or village, or with any other cities, towns or villages, whether such operation is by the Consumer or by any successor corporation, which may be by purchase, merger, consolidation, or otherwise acquire the rights, properties, privileges and franchises of the Consumer, and for the propulsion, lighting and heating of its cars on said system, and for other purposes connected with the maintenance and operation of its plant and system; and also for the purpose of its being sold or used in lighting the streets of

said City, and the public and private buildings therein, and for furnishing electric light or electricity for lighting, heating and motive power to said City, and its inhabitants and the inhabitants in the vicinity thereof; provided all contracts made by said Consumer for such retailing of said electric power shall be subject to this contract, and the liability of the Power Company for any purpose shall not be construed to extend to any other person or corporation other than the said Consumer. And for the purpose of fixing the amount of power that said Consumer will take from said Power Company, said Consumer will take from said Power Company all necessary power to be used by it, sold or applied for the purposes in this paragraph mentioned. And said Consumer is not permitted to and hereby agrees not to use, employ, consume, apply, sell, or retail said electric power delivered hereunder or any part thereof, in any place or places, or in any manner, or for any purpose or purposes other than are provided for in this contract.

Fifth. Said Power Company agrees that it will begin to deliver said electric power on or before the 1st day of September, 1909, or be ready, willing and able so to do, and said Consumer agrees that it will receive said electric power or be ready, willing and able so to do on or before the 1st day of September, 1909. And each party hereto agrees to notify the other party as soon as such party is ready, willing and able to perform its agreement in this paragraph contained. And in case either party hereto shall be delayed in or prevented from performing or carrying out the agreements, covenants and obligations made by and imposed upon said parties, or either of them, by this paragraph, by reason of or through strike, stoppage of labor, riot, fire, flood, ice, invasion, order of any court or Judge granted in any bona fide adverse legal proceeding or action, order of any civil authority, explosion, act of God or of the public enemies, or any cause reasonably beyond its control and not attributable to its neglect, then and in such case such period of delay or prevention shall not be reckoned or accounted as a part of the time within which said party was to so perform and carry out the same, and the days, dates, times and periods, mentioned in this paragraph, shall be extended for a period proportionate to such delay or prevention; provided, however, that the party or parties suffering such delay or prevention shall use all reasonable diligence to remove the cause or causes thereof, and either party shall give to the other written notice for such extension.

Sixth. Neither party hereto shall be responsible for accident of or injury or damage to the machinery, apparatus, appliances, or other property of the one caused by lightening, defects in, or a failure of the machinery, apparatus or appliances of the other; and it is expressly understood and agreed that said Power Company is merely a furnish of electric current deliverable at the delivery point herebefore provided for and that said Power Company shall not be in any way responsible for the transmission or control of said electric power or current beyond such point of its delivery to said Consumer, and shall not, in any event, be liable for damage, or injury to any

person or property whatsoever, arising accruing or resulting from in any manner, the receiving, use, consumption, application or distribution by said Consumer of said electric power, and said Consumer shall hold and save harmless the Power Company from any and all liability or liabilities to any person incurred or sustained by said Power Company by reason thereof or of any negligence or misconduct on the part of said Consumer, its officers, agents, servants, or employees.

Seventh. The furnishing, supplying and delivering by said Power Company of said electric power and the receiving, 239 using, consuming and applying thereof, and payment therefor, by said Consumer, is and shall be subject to and in accordance with the following rules and regulations, which shall be deemed and taken to be and are hereby made a part of this contract, to wit:

(A) For the purpose of ascertaining the amount of electric power being supplied under this contract, said Power Company may place and install at said transformer station and connect in circuit at the terminals of its power lines (said terminals to be established as hereinbefore provided for), such watt-meter or meters as in the opinion of said Power Company, may or shall be necessary to measure and record the said electric power — be kept accurate by and shall be the property of said Power Company, and their record shall be final in determining the amount of power used by said consumer hereunder; said meters shall be at all times, upon the written request of said consumer, subject to such standard tests as may be necessary to establish their accuracy, and said consumer shall under no circumstances interfere with said meters, but in case of defective or unsatisfactory service, said consumer shall immediately give written notice thereof to said Power Company. Said meters shall be provided, installed and kept in good repair by said Power Company, and the Power Company shall at all times have the right to inspect such meters, and if found to be defective to repair or replace them at its option. And it is further understood and agreed that the said meter or meters may be read by the Power Company as often as either party hereto may deem advisable.

(B) The Power Company shall at its own cost and expense extend its power lines to the terminal or delivery point located and established as hereinbefore provided; and for that purpose said consumer, in the event that said terminal or delivery point is on its premises, hereby gives and grants to said Power Company during the continuance of this contract, the necessary or convenient right of way with all incident privileges over its premises whereon to erect and maintain said power line and terminal. Provided, that right 240 or way shall follow as nearly as practicable a direct line from the point where it shall enter the premises of the consumer to said terminal point as aforesaid, and any change in the location of either will be made by the Power Company upon the written and reasonable request of the consumer, but the cost and expense of such change shall be borne by the consumer. The mains of the consumer

shall connect to and with the mains of the Power Company at the said terminal point, and the said Power Company shall make said connections and place upon the said premises of the consumer all appliances necessary to make and maintain the same in proper condition; all appliances so furnished by the Power Company shall be and remain the property of and shall be maintained and kept in repair by the Power Company.

— Said Power Company shall provide a regular and uninterrupted power service, and said consumer will regularly and continuously, receive, use and apply the same; but in case the service thereof shall be interrupted or suspended or fail, or in case said consumer shall be prevented from receiving, using and applying said electric power by reason of or through strike, stoppage of labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any Court or Judge granted in any bona fide adverse legal proceeding or action, or any civil authority, explosion, act of God or of the public enemies, or any cause reasonably beyond its control and not attributable to its neglect, then and in such event said Power Company shall not be obligated to deliver said electric power hereunder during such period, and shall not be liable for any damage or loss resulting from the interruption, prevention, suspension or failure, and said consumer shall not be obligated or liable to pay for such power not delivered, furnished or supplied during such period; and in any and all such event or events, the party suffering such interruption, prevention, suspension, or failure shall be prompt and diligent in removing and overcoming such cause or causes thereof; provided, however, that either party whose plant shall suspend operation by reason of accident to its machinery, plant or system, shall proceed at once to repair the same within a reasonable time, and failing so to do, the limit of an exemption from liability as fixed in this paragraph shall not apply and the

241 party shall be liable to the other as though no such limit or exemption had been fixed.

(D) The Power Company shall at all times during the continuance of this contract have the right of ingress to and egress from the premises of said consumer for any and all rights secured to or the performance of any and all obligations imposed upon it by this contract.

(E) If default be made at any time by the consumer in paying for the electric power delivered to it by the Power Company under and pursuant to the terms of this contract, and if such default shall continue for a period of twenty (20) days then the Power Company shall have the right at its option, to terminate this contract, or, at its option, without terminating or in anywise avoiding this contract, to discontinue, suspend and withdraw the delivery, furnishing or supplying electric power hereunder, until payment of all money due to it under the terms hereof from the consumer shall have been made: this option may be exercised by the Power Company whenever and as often as, any such default shall occur and continue for said period of twenty days, and delay or omission on the part of the Power Company to exercise such option at any time, shall not be deemed a

waiver by it of its right to exercise such option whenever such default on the part of the consumer shall occur. And said consumer shall pay to said Power Company all loss and damage resulting to it from such suspension of delivery of power hereunder. And in the event of such default in payment, or at the termination occur. *And said consumer shall pay to said Power Company all loss and damage resulting to it from such suspension of delivery of power hereunder. And in the event of such default in payment, or at the termination or expiration of this contract, then it shall be lawful for and the said consumer does hereby authorize and empower the Power Company, its successors and assigns, officers, agents, or employees, with the aid and assistance of any person or persons to enter in and upon the said premises of said consumer, and such other place or places whatsoever as or in which any meter, apparatus, appliances, fixtures, or other property of said Power Company, is, are or may be and remove, take and carry — the same.*

242 (F) No change in, modification, alteration or enlargement of this contract shall be valid or binding unless endorsed hereon in writing at the time the same is made and signed by the Presidents of both parties hereto.

Eighth. In consideration of the low rate at which power is to be delivered under this contract, the consumer agrees that its steam plant of 500 Kilo Watts capacity will be kept at all times in readiness to be put in operation, and that it will operate the same any afternoon between the hours of four o'clock P. M. and seven o'clock P. M., upon notice from the said Power Company, to furnish power either to itself or to said Power Company, or in case of accident or emergency said consumer agrees to put said steam plant in operation to supply its own demands or the demands of the Power Company, up to 500 Kilo Watts capacity. Any and all power so furnished to said Power Company shall be paid for by said Power Company at the rate of one and on- tenth (1.1) cents per Kilo Watt hour, and shall be delivered in the same manner as power is delivered to said consumer under the terms of this contract.

Ninth. This contract shall bind the parties hereto, and their successors and assigns.

Tenth. This contract is not binding upon said Power Company until ratified and approved by its Board of Directors.

In witness whereof, on the day and year first above written the said parties hereto have thereunto caused this agreement to be signed in duplicate, and caused their respective corporate names to be subscribed and their corporate seals to be affixed hereto by their respective presidents and attested by the respective secretaries duly authorized by resolutions duly adopted by their respective Boards of Directors. Southern Power Company. W. Gill Wylie, President. Attest: R. B.

Arrington, Secretary. (Seal.) Greensboro Electric Company. John Kerr, President. Attest: L. V. Taylor, Secretary. (Seal.)

"Defendant's Exhibit 11."*Ordinance and Resolution Granting Permission to Southern Power Co. to Construct and Maintain Its Lines, etc.*

STATE OF NORTH CAROLINA,
County of Rowan,
City of Salisbury:

An ordinance and resolution granting permission unto the Southern Power Company to construct and maintain its lines for the transmission of electricity upon, along, over and through the streets, highways, etc., of the City of Salisbury, in the County of Rowan, State of North Carolina, and to conduct and carry on within the corporate limits of the said City of Salisbury the business authorized by and under the terms of the charter of the said Southern Power Company.

Section I. Be it resolved by the Board of Aldermen of the City of Salisbury, County of Rowan, State of North Carolina, in meeting assembled, that assent and permission be, and the same is hereby, given and granted unto the said Southern Power Company, its successors and assigns, to lay, plant, extend, construct, build, erect, maintain, repair, and remove its lines, poles, wires, appliances, conductors, fixtures, and other appurtenances for the conducting, conveying, and the transmission of power by electricity upon, along, over and through any and all the highways, streets, roads, avenues, sidewalks, alleys, lanes, bridges, and other public places now laid out or in use, and all that hereafter may be laid out or put into use, within the corporate limits of the said City of Salisbury, and to do all necessary acts for that purpose; and assent and permission is hereby granted and given unto the said Southern Power Company 244 to conduct, carry on, transact, and do, within the corporate limits of the said City of Salisbury, any and all business and exercise all the rights and privileges which the said Southern Power Company, under and by the terms of its charter or otherwise, is authorized, empowered or permitted to conduct, carry on, exercise, do or transact, including among other powers, privileges, and rights, the right, power and privilege to use, lease, sell, convey and transmit power by electricity for manufacturing, lighting, heating, motive power, or other purpose or purposes, excepting, however, the right to construct, maintain and operate a car line within the City of Salisbury, North Carolina, under this franchise, for and during the term or period of sixty (60) years from and after the date of ratification hereof.

Section II. All poles used by said Southern Power Company shall be erected under the supervision and direction of the Board of Aldermen of said City of Salisbury, and all highways, roads, streets, sidewalks, lanes, alleys, bridges, and other public places that may be disturbed or damaged in the construction or maintenance of said lines, poles, wires, and other appliances, shall be promptly replaced

and repaired by said Southern Power Company at its own expense, and to the satisfaction of said Board of Aldermen, and all poles shall be substantial and symmetrical and so located as not to interfere with the public use of said highways, roads, streets, sidewalks, avenues, lanes, alleys, bridges or other public places, or to endanger the property or persons of the citizens of said City. And in case said Southern Power Company shall fail to replace or repair said highways, roads, streets, avenues, lanes, sidewalks, alleys, bridges, or other public places within ten days after written notice so to do from the Board of Aldermen, the same may be replaced or repaired by the proper authorities of said City, and the said Southern Power Company, in the event thereof, shall forthwith pay to said City the cost of such work and shall pay in addition thereto, the sum of Twenty-five (\$25.00) Dollars for each and every place so replaced or repaired, by way of compensation for the services of the City.

Section III. The rates charged by the said Southern Power
245 Company for said electricity shall at no time during the term of this franchise exceed the rates charged in the City of Charlotte, North Carolina, for similar services, by said Southern Power Company or other company affiliated with it, or upon application by said City of Salisbury at any time during the continuance of this franchise to the State of North Carolina Corporation Commission, or other lawful authority, for the promulgation of a proper and reasonable rate, the rate so promulgated and finally fixed by said corporation commission, or other lawful authority shall be the rate charged the consumers within the City of Salisbury by said Southern Power Company.

This franchise is given upon the following express conditions:

1. Said Southern Power Company shall be subject at all times to the Ordinances of said City.

2. Said Southern Power Company shall hold said City free and harmless from all damages or claims for damages arising by reason of the negligent construction or maintenance of said lines, poles, wires, appliances, fixtures and appurtenances.

3. The Southern Power Company shall notify the City of Salisbury in writing of its acceptance of this franchise within thirty days after the date of the granting hereof.

4. This franchise shall not be sold, transferred or assigned, or any part thereof, without the written assent of the Board of Aldermen of the City of Salisbury, North Carolina.

5. The Southern Power Company is to begin construction of the proposed lighting and power system under this franchise within thirty days from the acceptance thereof, and the said work is to be continued until the completion of said system.

6. In case the Southern Power Company shall fail to extend its lines into any area of said City, the Board of Aldermen shall
246 have the power to order any reasonable extension upon any reasonable terms and conditions to be fixed by said Board.

7. That there shall be no unreasonable interruptions or discontinuances of the exercise of the rights and privileges herein granted.

Done, resolved, ordained and ratified by the Board of Aldermen of the City of Salisbury, in meeting assembled, this 8th day of April, A. D. 1919.

Read twice at two separate meetings and ratified by the Board of aldermen of the City of Salisbury, N. C., this 8th day of April, 1919. City of Salisbury, by Walter N. Woodsen, Mayor. Attest: W. T. Rainey, Clerk. (Seal of City of Salisbury.)

"Defendant's Exhibit 12."

Schedule of Rates Charged by N. C. Public Service Co., Effective Prior to April 1, 1919.

N. C. Public Service Co.

Greensboro, N. C.

One Year Electric Lighting Rate—Application.

Agents of this Company are absolutely forbidden to make any agreement or promise not in writing or which is inconsistent with the printed provisions of the following agreement or the conditions thereto.

Cut out, ———.

New business, ———; change of, ———; serviced, ———; cut in, ———.

This agreement, Made and entered into this 30 day of August, 1918, by and between the N. C. Public Service Company, hereinafter referred to as the Company, and F. G. Brady hereinafter referred to as the Consumer, Witnesseth:

That in consideration of the Company furnishing current to the Consumer for Electric Lighting upon the premises 550 S. Mendenhall occupied as a Store (subject to the terms and conditions endorsed hereon, which are hereby made a part hereof) during the term of one year from the date of this contract, the Consumer agrees to pay for such current furnished at the Company's regular rates, subject to a minimum monthly charge of \$1.00 per month for each kilowatt of connected load or portion thereof (25 standard 30 watt lamps—1 kilowatt).

Rates.

1 to	100 Kw. H. per mo.	12c. per Kw. H.
101 to	200 Kw. H. per mo.	11c. per Kw. H.
201 to	300 Kw. H. per mo.	10c. per Kw. H.
301 to	400 Kw. H. per mo.	9c. per Kw. H.
401 to	600 Kw. H. per mo.	8c. per Kw. H.
601 to	800 Kw. H. per mo.	7c. per Kw. H.
801 to	1000 Kw. H. per mo.	6c. per Kw. H.
1001 Kw. H. and up	.....	5c. per Kw. H.

Provided, however, that if the monthly bill for service furnished hereunder is paid at the office of the Company on or before 5 o'clock

p. m. on the 10th day after its date a cash discount of 5 per cent. will be allowed.

248 Accepted for the Company 9/2 1918. (Signed) F. G.

Brady, by ———. Witness ———. By R. J. Hole.

By W. L. Scott. Note ———.

Payment Guaranteed by V. C. Lewis.

249

"Defendant's Exhibit 13."

Schedule of Rates Charged by N. C. Public Service Co. Subsequent to May 1, 1919.

Cut out, ———.

New business, ———; add'l, ———; change of ———; serviced No. ———; cut in 14675.

This agreement, made and entered into this 30th day of Nov., 1920, by and between the N. C. Public Service Company, hereinafter referred to as the Company, and Broadway Shows, hereinafter referred to as the Consumer.

Witnesseth: The Company agrees to furnish and the Consumer agrees to pay for current for electric lighting upon the premises described as No. — Fair Grounds Street (postoffice address, —; occupied as —) for the period of one year from the date hereof and thereafter, in the absence of a new contract for successive periods of one year (subject to the terms and conditions endorsed hereon, which are made a part hereof) at the Company's regular rates subject to a minimum monthly charge of \$1.00 per month for each kilowatt of connected load, or portion thereof, it being understood that the Consumer may terminate this contract at the end of any one year period by giving the Company ten days' prior notice thereof in writing.

Rates.

First	50 Kw. Hrs. consumed.....	9c. each
Next	50 Kw. Hrs. consumed.....	8c. each
Next	100 Kw. Hrs. consumed.....	7c. each
Next	600 Kw. Hrs. consumed.....	6c. each
Next	200 Kw. Hrs. consumed.....	5c. each
Next	1,000 Kw. Hrs. consumed.....	4c. each
Next	2,000 Kw. Hrs. consumed.....	3½c. each
Next	4,000 Kw. Hrs. consumed.....	3c. each

Provided, however, that if the monthly bill for service furnished hereunder is paid at the office of the Company on or before 5 o'clock p. m. on the 10th day after its date a cash discount of 5 per cent. will be allowed, but in no event shall the minimum monthly payment be less than \$1.00 net. (Signed) Broadway Shows, by Zillie Clark. Witness: G. G. G.

Accepted for the Company 11-30, 1920. By R. J. Hole.

Payment guaranteed by W. L. Scott.

NOTE, ———.

N. C. Public Service Co., Greensboro, N. C.

One-Year Electric Lighting Rate—Application.

Agents of this Company are absolutely forbidden to make any agreement or promise not in writing or which is inconsistent with the printed provisions of the following agreement or the conditions thereto.

250 Printed on the back of said Exhibits "12" and "13" is the following:

Terms and Conditions Referred to and Made a Part of This Agreement.

- (1) All wiring, lamps and other electrical equipment or apparatus within the premises of the Consumer, excepting the meter and service connections, shall be furnished and put in place by the Consumer, and the Company shall not be required to supply any current hereunder until such wiring, equipment and apparatus have been duly approved by the city inspector, and by the Company.
- (2) It is understood that the Company shall deliver current to the Consumer's wires just outside the wall of the Consumer's building, and that under no circumstances shall the Company be liable for any injury to persons or property caused by the use of current when such injury is produced or occasioned by defects in the Consumer's wiring or other apparatus used within the walls of the Consumer's building.
- (3) The Consumer shall not permit anyone other than the authorized employees of the Company to interfere with the meters or other appliances of the Company, and shall provide for the safe keeping of such meters and other appliances. The Consumer shall insure the Company against any damage or injury to the property of the Company located in the premises of the Consumer, which is not incurred by any act or omission on the part of the Company.
- (4) The Company shall use due diligence in providing a regular and uninterrupted supply of current, but in case the supply of current shall be interrupted or defective, the Company shall not be held liable therefor.
- (5) The Company shall have the right of access to said premises at all reasonable times during the period of this agreement, and on its termination, for the purpose of reading meters, of inspecting or repairing appliances used in connection with its current, or of removing its property, and for any other purpose proper under this agreement.
- (6) The Company shall have the right at any time to terminate this contract for breach of any of the terms and conditions thereof. The Company shall also have the right to stop the supply of current to be furnished hereunder for any of the following reasons or purposes without such action causing a termination of this contract: (1) For repairs. (2) For want of supply. (3) For non-payment of amount payable hereunder when due. (4) On account of or to prevent fraud or abuse.
- (7) Where the current is furnished by meter, should the meter or meters fail to register the current, the consumption will be aver-

aged by another meter or meters, or by the amount charged for corresponding month.

(8) The Consumer agrees that bills rendered will be paid at the office of the Company within 10 days from date of bill, and that no claim, counterclaim, demand or offset of any nature or kind whatsoever shall be set off or allowed as a credit against any bill rendered hereunder for current furnished, but such bill shall be promptly payable in accordance with its terms, notwithstanding any such real or pretended claim, counterclaim, demand or offset.

(9) The Consumer agrees to notify the Company in writing of any additions or alterations in the equipment to be supplied with electric current and such additions or alterations shall not be connected to the system supplied with electric current except by the authorized employees of the Company.

(10) This paper writing, though designated as an agreement and signed by the Consumer, shall nevertheless be construed until accepted in writing by the proper officer of the Company as an application to furnish electric service, and when so accepted in writing by the proper officer of the Company shall be and become an agreement between the Consumer and the Company. In case the rate for the class of service covered by this contract is reduced, the Consumer shall have the benefit of such reduction.

(11) This contract applies only to the premises mentioned herein and electric current cannot be used on other premises or resold. The Consumer also agrees that he will use his total requirements of electric current for the premises mentioned herein under this Contract.

(12) That all rates quoted herein are subject to the jurisdiction and ruling of the State Corporation Commission.

"Defendant's Exhibit 14."

Letter from E. C. Deal to W. S. Lee Dated July 28, 1916.

N. C. Public Service Co.

Greensboro, N. C., July 28th, 1916.

Mr. W. S. Lee, Pres. Southern Power Company, Charlotte, N. C.

MY DEAR MR. LEE: In accordance with our conversation when I saw you last, I am enclosing herewith report on water power site at High Rock, N. C., made by the Fargo Engineering Co.

I would be glad to have you look over this report at your earliest convenience and return same to me, together with your opinion as to the possibilities of this power as a hydroelectric proposition. If you desire to discuss it with me in person would be glad to run down to Charlotte and see you at your convenience. Yours truly, N. C. Public Service Co. E. C. Deal, Vice-Pres. & Gen. Mangr. ECD:F.

Attached to said Exhibit is the following carbon copy:

August 3, 1916.

Mr. E. C. Deal, Vice-Pres. & Gen. Mgr. North Carolina Public Service Company, Greensboro, N. C.

MY DEAR SIR: Your favor of the 28th ult., enclosing report on water power site at High Rock, N. C., made by the Fargo Engineering Company, was duly received, but owing to the fact that I have been exceedingly busy on trouble caused by the recent flood, I haven't so far had an opportunity to go into this matter. Respectfully yours, — — — Vice-President. dec.

Defendant's Exhibit No. 15.

Opinion of Supreme Court of North Carolina, dated December 20, 1919, as published in Greensboro Daily News Thursday, May 6, 1920.

To the Citizens of Greensboro:

Below is printed in full the duties and obligations of The Southern Power Company to you and other citizens of the State, as declared by the Supreme Court of North Carolina.

(Reprinted from Vol. 101 Southeastern Reporter, under copyright by West Publishing Co., 1920.)

(Supreme Court of North Carolina, Dec. 20, 1919.)

(No. 385.)

SALISBURY & S. RY. Co. et al.

v.

SOUTHERN POWER CO.

1. Pleading Key 214 (1)—Admission by Demurrer Ore Tenus.—A demurrer ore tenus admits all of the allegations of the complaint.
2. Pleading Key 34 (3)—Presumptions on Demurrer.—Every reasonable intendment and presumption must be made in favor of a pleading attacked by demurrer.
3. Electricity Key 11—Duty of Public Utilities Not to Discriminate.—A hydroelectric company, which was a public utility engaged in the sale of electric current, should not be allowed to discriminate between customers.
4. Electricity Key 11—Right of Public Utility to Discriminate Between Customers.—Where a hydroelectric company induced petitioner, another electric company chartered to retail current, to abandon its steam plant for generating current and to buy current from the hydroelectric company,

such hydroelectric company became a public utility in the sale of current for distribution by others, and cannot justify an attempted discrimination against petitioner on the ground that both petitioner and itself were chartered to generate current, etc.

5. Electricity Key 11—Discrimination Not Permissible on Claim of Right to Select Customers.—A public utility, as a hydroelectric company having almost a monopoly of water power, cannot discriminate against individuals or users of electric current on the ground that it has a right to select its customers.
6. Electricity Key 11—Relief by Courts Against Discrimination.—Where a hydroelectric company, which has practically a monopoly of water power, attempted to discriminate between customers, the courts can give relief; it being a simple matter to compel the electric company to charge to all customers the lowest rate extended to any.
7. Electricity Key 11—Right to Discriminate and Select customers.—A hydroelectric company, which by the exercise of the rights of eminent domain, etc., brought itself within the statutes applicable to public utilities, cannot discriminate against customers.
8. Mandamus Key 134—Prevention of Discrimination by Electric Company; Remedy.—Mandamus is the proper remedy to compel a hydroelectric company to abandon practices of discrimination between customers and furnish to petitioner currents at the same rates furnished to other customers.
9. Electricity Key 11—Retail by Patron at Excessive Profit Will Not Authorize Discrimination.—That a purchaser of current from
254 a hydroelectric company which had a practical monopoly of water power retailed it at an excessive profit will not justify the company in discriminating against the purchaser.
10. Mandamus Key 172—Proceeding to Discontinue Discrimination Not One to Fix Rates.—A proceeding to compel a hydroelectric company to cease discriminating against petitioner, from which it had attempted to exact a higher rate than others, is not a proceeding to fix reasonable rates.

Allen and Walker, JJ., dissenting.

Appeal from Superior Court, Guilford County; Shaw, Judge.

Petitioners, the Salisbury & Spencer Railway Company and the North Carolina Public Service Company for a writ of mandamus against the Southern Power Company. A demurrer to the petition was overruled, and defendant appeals. Affirmed.

This was a mandamus against the Southern Power Company, to compel it to continue to furnish electric current from its substation at Salisbury to the plaintiffs for the use and benefit of Salisbury, Spencer, and East Spencer and the inhabitants thereof, and for operation of the electric street car system, as theretofore furnished,

and to compel said Southern Power Co. to furnish such service power and current, and without discrimination in favor of others for like service, under the same or substantially similar conditions. The Southern Power Company answered, and in addition demurred ore tenus to the complaint, alleging: (1) That the court has no jurisdiction to compel it to furnish electric current and power from its substation at Salisbury to the plaintiff for the purpose set forth in the complaint; and (2) that the court has no power or jurisdiction to require the defendant to furnish power at a uniform rate without discrimination against the plaintiffs. The court held that it had jurisdiction to pass upon and determine the matters set out in the complaint, and that the complaint states a good cause of action.

The complaint avers that the plaintiff Salisbury & Spencer Railroad Company is a public service corporation, under the laws of this state, which operate a street railway, electric light, and gas plant in Salisbury, Spencer, and East Spencer, its franchise rights
255 being granted by those cities to operate the street railway by electricity and to furnish electric current for the public lighting of said cities and to the inhabitants of the same for domestic and power purposes. On January 11, 1912, it leased all of its rights and property to its coplaintiff the North Carolina Public Service Company for a period of 50 years. The latter company is a public service corporation chartered under the laws of this state, with its principal offices in Greensboro, and it owns a large part of the capital stock of the Spencer & Salisbury Railroad Company, and has for many years past and still does control and manage the same through the 50-year lease, including the purchase of electric power from the defendant and its distribution to said city for domestic and industrial use, as well as the public lighting for the streets of the three said cities, and it also owns and operates similar properties in Greensboro, High Point, and Concord, N. C.

The defendant power company is a public service corporation chartered in New Jersey and doing business in this state, with its principal office in Charlotte. It is engaged directly and indirectly in the business of generating hydroelectric power by means of dams built across large streams of water, which by suitable machinery is converted into electric power and conveyed over large wires of heavy voltage in great quantities to "receiving substations." At these stations large transformers are installed by the defendant company, by which the current thus received is "stepped down," that is, reduced from 100,000 voltage to as low as 2,300 volts, and after being so reduced the power is sold and distributed to various and sundry consumers connected with these substations. At each of these substations the agent of the defendant company keeps a record, by means of separate meters, of the amount of electric power furnished each consumer. The defendant has built transmission lines to various points in Western and Piedmont North Carolina, Gastonia, Concord, Salisbury, Spencer, Statesville, Winston-Salem, High Point, Greensboro, Burlington, Graham, Hillsboro, Durham, Spray, and Reidsville, and to many cotton mills and other industrial plants along or near its lines connecting these various cities and localities,

and at each of the above places it maintains and operates various substations as above described.

The defendant power company is a public service corporation, and only by reason thereof enjoys the right of eminent domain under which it has been enabled to construct and operate these lines and the said company is the only hydroelectric company whose transmission line extends to the points above named, including the towns of Salisbury, Spencer, and East Spencer. It enjoys, therefore, a monopoly of this business, and also by long service its business is "affected with a public use," and it is therefore subject to public control and regulations, not only in fixing and prescribing its rates, but more especially in the requirement that it shall furnish its facilities at the same rate to all receiving them under like conditions. The plaintiff the North Carolina Public Service Corporation, prior to the time the defendant's transmission line was completed at Salisbury, generated its own electric current and power by a local steam plant, but about ten years ago the defendant approached the plaintiffs, assuring them that it would furnish power at less cost than it could be produced by steam generated from coal, and on this assurance the plaintiff and a large number of mills, factories, and other industrial plants were induced to discontinue their steam plants and made contracts with the defendant for their necessary electric current and power. Thereby the defendant acquired a complete monopoly of the hydroelectric power market at Salisbury and Spencer. The contract between the plaintiffs and the defendant was for ten years, and expired August, 1918. Under that contract the defendant charged the plaintiffs a rate of 1.1 per Kw. H. Some months prior to the expiration of this contract the defendant proposed to the plaintiff Public Service Company to make a new contract for the same service for another ten years at a substantial increase in rates. The defendant refused to contract for a period of less than five years, and persisted in demanding an increase in rates, and sent its agent to the home office of the plaintiff North Carolina Public Service Company in Greensboro, and demanded that the contract which it then presented should be signed within 48 hours. The rate stipulated in said contract was greatly in excess of the former rate, being increased to 1.5 per Kw. H., and was based upon the then war price of coal according to the statement of defendant's agent.

The plaintiff especially objected to this increase of increased rate, on the ground that it was beyond the rate charged by the defendant to other companies for like service under the same or substantially similar conditions, and the plaintiff declined to sign said contract.

The defendant power company, after the expiration of the ten-year contract, rendered the Public Service Company bills for current and power at the rate of 1.8 mills per Kw. H., and notified the plaintiff that if this rate was not paid it would discontinue supplying current to the plaintiff at Salisbury. The president of the defendant power company is J. B. Duke, who is the principal owner thereof and controls its policy and management. He is also largely interested financially in various cotton mills in North and South Caro-

lina, and in street power and street railway and electric lighting also, some of which mills and plants are located in Charlotte, Gastonia, Concord, and Durham, and all are furnished light and power through the current received from the defendant power company, which has been and is selling current to those mills at a maximum rate of 1.1 per Kw. H., and in some instances to be used for power and lighting the mills and villages and other plants in which the defendant's principal owner is interested, and in some instances at a lower rate, greatly less than is charged and proposed to be charged the plaintiffs under substantially similar conditions; the said J. B. Duke is also the principal owner, either directly or indirectly, through his immediate family, of a subsidiary corporation of the Southern Power Company known as the "Southern Public Utilities Company," which last-named company owns the public utility franchises in Charlotte, Winston-Salem, Reidsville, and other towns and cities, and is now engaged in furnishing hydroelectric power and lights to those municipalities.

The power is furnished by said defendant company to the Public Utilities Company, one of its subsidiary companies, at its substations in Charlotte, Winston-Salem and Reidsville, under a long-term contract extending to 1944 at a less rate than it now charges the plaintiffs for current furnished under substantially similar conditions at its substation near Salisbury. The defendant power company is now selling distributing power from its substation at Salisbury to the Vance Cotton Mill under a contract entered into in the past year, and since the war began, at a rate of 1.1 per Kw. H. for day service and at a still lower rate for night service, and for the same service through the same substation under substantially the same conditions it is charging these plaintiffs 1.8 mills per Kw. H. The defendant power company is also furnishing current and power to the municipalities of Salisbury from the same substation for water pumping services at a rate of 1 cent per Kw. H., and for like service under similar conditions is charging these plaintiffs 1.8 cents per Kw. H., or nearly double.

The plaintiffs are among the largest single purchasers and consumers of power and current from the defendant's substation at Salisbury and Spencer, and on account of the growth of those towns and their increased demand for power and current the plaintiffs are unable to supply the same except by purchase from the defendant through its substation. This fact is well known to the defendant, and it declines to contract with the plaintiff to furnish it power and current for a less period than five years, and only at a far higher price, based on the present war price of coal, and threatens to cut off its supply of current unless it will submit to the discrimination, which would leave Salisbury and Spencer without lights for the homes and places of business of its people and without power for the operation of their industrial plants or any means of operating the street railway.

The defendant's first proposal to renew its contract in 1917 was for a charge of 1.4 mills per Kw. H., which it raised at the expira-

tion of the contract in 1918 to a charge of 1.5 Kw. H., when at that time it was selling power and current to Reidsville and its inhabitants under a contract for 10 years entered into 1917 at a rate of 1.4.

To maintain a consistent and auxiliary supply of current and power in case of accident or low water the defendant power company has at several points along its line built steam plants, which it operates by the use of coal. Substantially all the power and current furnished

these plaintiffs at Salisbury is generated by means of water
259 which cost the defendant power company 4 mills per Kw. H., and it now purposes to discriminate against the plaintiffs by requiring them to pay for current and power under a long-term contract, based on war time cost of coal, at a much higher rate than in any case it charges the cotton mills along its line of its subsidiary company (or alias), the Southern Public Utilities Company, for like service rendered under substantially similar conditions.

The defendant power company has no established rates of furnishing power in the absence of a contract and no rates for such power have even been filed with the Corporation Commission, and the Corporation Commission has never promulgated any rules or regulations to prevent discrimination by the defendant in furnishing power.

The defendant power company on February 8, 1914, filed with the Corporation Commission of North Carolina a partial schedule of its rates, with the added statement:

"Each case must be treated on its peculiar circumstances, and the rates are subject to the reasonable rules and regulations of the power company's charter. The filing of these rates by this company is in deference to the request of the commission, and must not be treated, or considered, as done because any legal obligation is imposed upon it to file the same. This company is advised that no legal obligation exists."

The Corporation Commission expressed the opinion to the plaintiff that it had no authority under the act of the Legislature conferring upon it jurisdiction with respect to the regulation of public utilities to pass upon a question of involving a contract between one public utility company and another public utility company as here presented.

The defendant power company justifying its increase in rates charged these plaintiffs says:

"Which increased rate is absolutely necessary to earn any income upon its capital invested in its hydro-electric power plant."

260 The plaintiffs, replying to this proposition, state in substance that the Southern Power Company was incorporated in New Jersey in June, 1905, by J. B. Duke and others, and has acquired rights and built power plants on the Catawba and Broad rivers in South Carolina, capable of developing a rated capacity of 88,000 H. P., and it has also built transmission lines as stated in the plain-

tiffs' complaint, and which is further illustrated by the annexed copy of the map of its lines issued by the defendant company.

The plaintiffs further say that the defendant company organized another corporation, which is controlled by it and is substantially an alias, known as the Great Falls Power Company, which was incorporated in New Jersey in November, 1909, and as owners of the Southern Power Company sold to themselves as owners of the Great Falls Power Company the three hydroelectric power plants which had been erected by the Southern Power Company. To take care of the cost of developing this property the defendant power company placed a mortgage upon the same in the sum of \$10,000,000, \$7,000,000 of which has been sold, and the plaintiffs allege was substantially the actual cost of the property purchased and developed. In addition to this bonded indebtedness, the Southern Power Company issued to themselves \$6,000,000 of 7 per cent. accumulative preferred stock and \$4,000,000 of common stock. The same interests, and substantially the same men, in organizing the Great Falls Power Company as the holding company for the hydroelectric generating property, took over this part of the development of the defendant company, and executed back a contract at the same time, which provided that the Great Falls Power Company should furnish its hydroelectric to the defendant for a long term of years at the rate of 4 mills per Kw. H., and as a part of this transaction the defendant Southern Power Company guaranteed to hold the Great Falls Power Company free and clear of any liability under the mortgage; that the defendant company acting for itself, and the same interest also acting for the Great Falls Power Company, required the company to issue \$5,768,800 of 7 per cent. accumulative preferred stock and also \$5,678,800 common stock, which said stock was substantially all turned over to the defendant Southern Power Company and its promoters, who now own the same. About June 1, 1915, the defendant company offered for sale in the city of New York, through the National City Bank of that city, the \$7,000,000 of bonds secured by first mortgage upon defendant's property, and the vice president of the defendant company, W. S. Lee, who was also vice president of the Great Falls Power Company, stated in a public letter, which was published at that date in a circular by the National City Bank, that the earnings of the defendant company as officially reported for the year ending April 30, 1915, were as follows:

Gross receipts	\$248,578.79
Operating expenses (including taxes and rentals) ...	1,111,016.97
Net earnings	\$1,374,772.82
Annual interest on bonded indebtedness.....	350,000.00
Balance	\$1,024,772.82

And immediately thereafter this statement was made:

"The net earnings for the year ending April 30, 1915, were almost four times the interest requirements of the \$7,000,000 first mortgage bonds which will shortly be outstanding."

The plaintiffs aver on what they claim sufficient and reliable evidence that the company's net earnings in 1917 were in excess of \$2,000,000, while the interest paid on the bonded indebtedness, much of which was water, had not increased at all, and that in 1915 its net profits applicable to dividends were over \$1,000,000, and at that time, after paying 7 per cent. on the \$6,000,000 cumulative preferred stock (i. e., \$420,000), there was still left applicable to the \$4,000,000 of common stock \$604,000, net profit of 15 per cent, and at present probably this amount has been greatly increased. The plaintiffs are not advised as to how much dividend the defendant's stock in its holding company, the Great Falls Power

262 Company, is earning at selling to itself hydro-electric current at 4 mills per Kw. H., which the defendant company is reselling at discriminating prices to its different customers according to the object its has in view, which may be either to encourage, or to destroy, and thereby acquire these different plants.

The plaintiff urges among the instances of discrimination the following: That the defendant is:

(1) Supplying the current to the Southern Public Utilities Company which is a company engaged in precisely the same character of business as these plaintiffs under a long term contract at a rate much less than that charged and demanded of the plaintiffs.

(2) The defendant supplies current to sundry cotton mills for power and lighting mill villages at rates much less than that charged and demanded of these plaintiffs.

(3) The defendant supplies current and power to various towns and municipalities under a long-term contract at rates much less than that charged and demanded of these plaintiffs.

(4) The defendant supplies current to sundry cotton mills, entered into since the declaration of war and since the abnormal increase of coal, at a rate much less than that charged and demanded of these plaintiffs.

The above are substantially, somewhat condensed, the statements and allegations of the complaint, which must be taken as admitted, as this case is presented upon the demurrer ore tenus thereto of the defendant.

The court overruled the demurrer, and the defendant appealed.

Cansler & Cansler and Osborne, Cocke & Robinson, all of Charlotte, for appellant.

Linn & Linn, of Salisbury, Roberson, Dalton, & Smith, of High Point, and Brooks, Sapp & Kelly, of Greensboro, for appellees.

CLARK, C. J.: (1, 2) By demurring ore tenus the defendant "admits all of the allegations made by the plaintiff, and if any part of

263 the complaint presents facts sufficient to constitute a cause of action, or facts sufficient for that purpose can be gathered from it under a liberal construction of its terms, the pleading will be sustained." *Hendrix v. Railroad*, 162 N. C. p. 15, 77 S. 1003.

"Every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." *Brewer v. Wynne*, 154 N. C. 471, 70 S. E. 947.

In *Garrett v. Trotter*, 65 N. C., 432, *Pearson, C. J.* says:

"A defect in pleading is aided if the adverse party lead over to, or answer, the defective pleading in such a manner that an omission or informality therein is expressly or impliedly supplied or rendered formal or intelligible." * * * The principle commends itself so strongly by its good sense, that it must be taken to underlie every system of procedure professing to aim at the furtherance of justice, and to put controversies upon their merits, and not allow actions to go off upon subtleties and refinements."

The facts in this case admitted or not denied are that:

(1) The defendant Southern Power Company is a public service corporation, and as such subject to the laws of North Carolina governing public utilities companies.

(2) As such public service company, and by virtue thereof only, it enjoys and exercises the right and power of eminent domain, and as a consequence must discharge its duties subject to public regulation of its rates and conduct and without discrimination in the facilities it extends and the rates it charges under the same or substantially similar conditions. *Railroad Discrimination Case*, 136 N. C., 479, 48 S. E. 813.

(3) The defendant has a monopoly of the hydro-electric power supply and the markets therefor in the territory through which its lines extend.

264 (4) It has been engaged more than ten years past in selling hydroelectric current to this plaintiff, to be resold at retail to citizens at Salisbury, Spencer, and East Spencer, High Point, and Greensboro, and also to the Southern Public Utilities Company (which the defendant substantially owns and controls) to be resold, at Charlotte, Winston-Salem, and Reidsville, and other points, and is selling its current to the municipalities of Lincolnton, Shelby, and Newton, to be resold to their respective citizens, and its business has become affected with a public use, and is for that reason also subject to public regulation of its rates and conduct, which rates cannot be discriminatory under like conditions or at the same points.

(5) In 1914 it filed a statement with the Corporation Commission, denying that the Commission had any authority to require it to file a schedule of its rates or to promulgate rules and regulations

governing it and expressly asserted this power to be in itself by saying, "Each case must be treated on its peculiar circumstances, and the rates are subject to the reasonable rules and regulations of the company," thereby asserting its exemption from control of the law and its superiority to public regulation of its conduct or rates.

(6) Exercising the power, thus boldly declared that it possesses free from any control by the public, it declines to sell power and current to any consumer for a less period than five years, and then only under the terms which it sees fit to offer under its assertion of absolute sovereignty and freedom from control by law.

(7) If a purchaser declines to accept any contract it offers, it charges such other higher rate as it may deem proper; for instance, it is charging the plaintiffs 1.88 mills for a current which costs 4 mills, and which it is selling to others at Salisbury at 1.1, and which it is selling to the municipality at that point at 1 per Kw. H.

(8) The defendant has entered into a long-term contract, extending to 1944, to furnish power to the Southern Public
265 Utilities Company (which it substantially owns) at less rate than it will sell to the plaintiffs or any municipality in this state.

(9) In 1917 it entered into a contract with its subsidiary (or alias), the Southern Public Utilities Company, to resell power at Reidsville at a figure so low that said utilities company is reselling power at a lower rate than the defendant power company will sell at wholesale to the plaintiffs.

(10) The defendant company sells current only when reduced to not below 2,300 volts, and is not engaged in the retail power business. It induced the plaintiffs to discontinue their steam plant and purchase current from it on the basis of 1.1 knowing that the current and power to be resold in Salisbury and other towns in which plaintiffs do business.

(11) It offers to sell the plaintiff current and power to be retailed by it, if the defendant is allowed without legal restraint to fix the price and terms of the contract.

(12) It pleads want of authority in the courts to compel it to furnish power to the plaintiff upon the ground that it must not be restricted from discrimination in its rates.

(13) The defendant Southern Power Company purchases its current at 4 mills per Kw. H., under a long-term contract, but declines to allow the plaintiff to share in the water rate of 4 mills, and requires the plaintiffs to pay it 1.88 or more than 470 per cent profit.

(14) The defendant Southern Power Company seeks to justify its increase in rates by alleging that it is necessary to do so to earn any dividend on the capital invested. The bonds, common and preferred stock outstanding against this property exceeds \$28,000,000, and over half the stock it has issued the plaintiff avers that it can show was not issued for expense incurred and represents only inflation.

(15) The large increase in price for power of nearly 100 per cent. charged the plaintiff, i. e., from 1.1 to 1.88, has been applied only to the plaintiff. But in all cases it charges municipalities and other public utilities companies more for current and power than it charges its own subsidiary, the Southern Public Utilities Company, thereby pressing most heavily upon those least able to resist extortion, and who are for that reason most entitled to the aid of the state for their protection.

(16) The properties and plant of the defendant Southern Power Company and its affiliated and subsidiary companies were acquired and the plants completed substantially prior to the declaration of war, and it is entitled to no increased charges by reason of the advance in coal and labor since that date by reason of the fact that the cost of its operations is based upon the employment of a very small number of employees, and it is entitled to earnings almost solely upon the capital invested in properties and plants which have not been largely increased.

(17) Its current is received by it under a long-term contract, under which it has sub-contracted to sell to its subsidiary, the Southern Public Utilities Company, until 1944, at a less rate than it charges any other consumer. It only pays 4 mills for this current, and the former rate of 1.1 (i. e., 1 1-10 cents) to the plaintiff would seem more than sufficient for proper remuneration, being a profit of 275 per cent.

(18) The public policy of the state and of the national government, which has been expressed not only in its Constitution from the beginning and has been recently more fully expressed in statutes against trusts, and by decisions in the United States Supreme Court, forbids that this enormous aggregation of capital, charging exorbitant rates, as appears by its own admissions in this record, should have, as it explicitly claims, the unrestricted right to fix its own rates and to discriminate between its customers, as if it were a private individual dealing in a competitive market.

[3] It is of the highest importance that these claims of the defendant Southern Power Company to discriminate in the rates charged by it to purchasers under like conditions should be clearly denied by the courts. If the defendant is thus permitted to charge cotton mills in which the owners of the defendant are interested the rate of 1.1, while it charges the plaintiffs and other mills and industries in which it is not interested 1.88, or a higher rate than it does others in like condition, it follows that in a comparatively brief time the defendant will have the power to destroy, and thereby acquire the ownership of, all the other cotton mills and industrial plants in the state, and thus create a cotton mill monopoly wherever its lines extend, for by reason of the approaching exhaustion of the coal mines and the interruption of their operations there can soon be left available for large industrial plants no other power than the monopolized water power of the state.

[4, 5.] The counsel for the defendant upon the argument stressed the contention that both plaintiff and defendant being public service

companies and authorized by their respective charters to generate and sell to the public electric current, plaintiff could not evade this duty and require the defendant to furnish it current and power to resell. This argument is plausible, but we think unsound and untenable upon the admitted facts in this record. The defendant's charter expressly authorizes it to sell current and power to other public utility companies for the purpose of resale. This charter power is not mandatory. Still, when the defendant elected to exercise this power and ten years ago made a contract with the plaintiff Salisbury & Spencer Railroad to furnish current and power to be resold to the people of that city for the next succeeding ten years, and induced it to scrap its steam plant and to rely solely upon the defendant for its hydro-electric power, and thereafter made similar contracts with the other plaintiff, the North Carolina Public Service Company, for ten years for current to be resold in Greensboro and High Point, and contracted with its own subsidiary, the Southern Public Utilities Company, to furnish it current and power up to 1944, to be resold, it dedicated its property to this particular class of public use, and cannot discriminate in charge or service between the several members of this class, for this would be a license to discriminate among cotton mills as a class, furniture, factories, etc.

268 Wyman on Pub. Service Corp. sec 10, says:

"Those who conduct private enterprises may use many schemes, but those who offer public employment must not adopt any business policies which are anyways inconsistent with impartiality in discharge of their public duties."

It is well settled that the common-law obligation of equal and discriminating service clearly requires that the same charges shall be made to all consumers for the rendering of similar service. The Supreme Court of the United States, in *Western Union Telegraph Co. v. Call Pub. Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, very fully discusses this doctrine, and in the course of its opinion says:

"They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights, both in respect to service and charges. * * * To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations is a proposition which, to say the least, is startling."

This obligation cannot be evaded, even though the purchaser of the current may be to some extent a competitor. This question is very fully discussed in *Postal Cable Telegraph Co. v. Cumberland T. & T. Co.* (C. C.) 177 Fed. 726 et seq. The court there says:

"The portion of the sovereign power with which telephone companies are as common carriers endowed is likewise given them for the purpose of serving, not merely part of the public, but all of the

public; and all persons composing the public, even though they be, in a sense, competitors, are entitled to use their privileges upon equal terms, and 'have equal rights both in respect to service and charge.' "

269 The Corporation Commission of California, in an opinion rendered July 23, 1917, in the matter of the application of the Great Western Power Company, discussing the right of the power company to arbitrarily select its consumers, states "that the duties and obligations which it has undertaken do not contemplate the right on its part to select the consumers it will serve," and further says:

"It is clearly the duty of the public utility, situated as is the petitioner, to supply every reasonable demand for service at nondiscriminatory rates, and under just terms and conditions. Nor can this duty be avoided, modified, or abridged in any manner whatsoever, either by contract between the utility and any private interest or by the maintenance of unsuitable falicities. * * * In case of a temporary insufficient supply of electric energy to meet all reasonable demands in the territory which petitioner has elected to serve, the available supply will, of course, be prorated upon an equitable basis, consideration being given to the necessities of the public, irrespective of whether or not these necessities arise directly or through the medium of another utility."

The foregoing is a just and reasonable statement of the common law obligation resting upon public utility companies such as the defendant.

It appears from the investigation made by Congress into the water power of the country that 94 per cent of the water power of this state has been acquired by corporations which are either already owned or can soon be acquired by the Southern Power Company or made subsidiary by the use of the same method of underbidding, and afterwards acquiring competitive plants, by which means the American Tobacco Company and the Standard Oil Company acquired the monopolies which since have been to some extent abated by the courts in pursuance of the action of Congress taken at the demand of a sound and overwhelming public opinion.

The method being used by the defendant company by discrimination in the prices to consumers is identical with that which built up the Standard Oil Company, the American Tobacco Company, and other great trusts which came under the ban of congressional enactment, and which were condemned by decisions of the United States Supreme Court and by decrees of dissolution.

270 The control of the defendant corporation is by the same men who organized the American Tobacco Company, which was ordered dissolved in the case of United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663 (October term, 1910), in which the United States Supreme Court, in an opinion

by Chief Justice White, held that J. B. Duke, the president of the tobacco company, was individually responsible for the violations of law committed by that concern. The court in that opinion, speaking of the unlawful practices which were identical in all points with those in this case, as charged in the complaint and admitted by the demurrer, recited the many facts which it held proven "by the very present manifestation which is exhibited of a conscious wrong-doing by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same. Not the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the few who, it would seem, from the beginning contemplated the mastery of the trade which practically followed. By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade."

The court further says of that combination and monopoly:

"The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or plaudits upon the cupidity of competitors would make success possible."

The story of high finance and monopoly record as shown in this case is displayed along the same lines in this present enterprise. In 1905 the same J. B. Duke and his associates, as disclosed by the undisputed facts in this record, incorporated the defendant company in New Jersey, in which state the American Tobacco Company and its subsidiary companies or aliases were chartered. The defendant company acquired water rights and built power plants on the Catawba and Broad rivers in South Carolina. Afterwards the same Duke and associates organized the Great Falls Power Company, also chartered in New Jersey in 1907, and as owners of the Southern Power Company on March 1, 1910, sold to themselves as owners of the Great Falls Power Company the three hydroelectric plants which had been erected by the Southern Power Company. To take care of the cost of developing this property the owners and promoters of the defendant power company placed a mortgage upon the same in the sum of \$10,000,000, which it is alleged is substantially the cost of the property purchased and developed. In addition they issued to themselves \$6,000,000 of 7 per cent cumulative preferred stock and \$4,000,000

of common stock, and substantially the same interest and men organizing the Great Falls Power Company, as the holding company for the hydroelectric generating properties, took over its part of the defendant company, and immediately executed back a contract, which provides that the Great Falls Power Company shall furnish its hydroelectric current to the defendant for a long term of years at the rate of 4 mills per Kw. H. The defendant company and its promoters, acting for themselves and for the Great Falls Power Company, caused the latter company to issue \$5,768,800 of 7 per cent cumulative preferred stock, and also \$5,768,800 common stock, which said stock was substantially all turned over to the defendant company and its promoters, who now own the same. Thereafter the same J. B. Duke and associates organized a subsidiary retail company known as the Southern Public Utilities Company, which was 272 principally owned by himself and immediate family and controlled by him. The company acquired a monopoly of the retail electric power business in Charlotte, Winston-Salem, and Reidsville. Thus these two corporations under the same control monopolized the wholesale supply of current and the retail distribution of same wherever a subsidiary company could get control of the municipal franchises. It is unnecessary to trace the transactions of this company in all its manifestations, but enough has appeared to show that the existence and operations of a water power monopoly, with power to discriminate in its rates, would be a menace which neither the courts nor the public can disregard.

The object of this action is not to declare or fix rates; nor is it to have the rates declared exorbitant, however clearly this may appear, but to prevent that discrimination between the purchasers of its power, which is a method by which the Standard Oil Company, the American Tobacco Company, and all other trusts have crushed opposition and enlarged their power and increased their accumulations to a point which made them a menace to governments by the people, and caused their dissolution by judicial decree.

[6] The argument is presented that, even though an unlawful discrimination in rates exists, still the courts are without power or procedure to correct the evil. Such judicial impotency does not exist in North Carolina. This court in the railroad discrimination cases (136 N. C. 479, 48 S. E. 813, and 141 N. C. 171, 53 S. E. 823, 6 L. R. A. [N. S.] 225) established the rule and procedure by which such questions should be determined. Justice Connor, speaking for the court in the latter case, says:

"However the courts construe statutes making penal or criminal a violation of the equality of right, when we come to deal with the question, in the enforcement of the civil right of the citizens, we must construe the law so that the right is secured and the remedy for its infringement given. This is the keynote of the decisions, both in England and this country."

It will not be difficult for the court upon the hearing to determine the lowest rate charged by the defendant for current and power 273 furnished cotton mills, factories, municipalities, or other public service companies, under the same or substantially similar

conditions. The lowest rate thus established will automatically become the proper rate to be charged the plaintiffs for such service. Otherwise, the defendant will still be unlawfully discriminating against the plaintiffs.

The remedy sought here by a mandamus to compel the defendant company to concede to the plaintiffs the same rates that it grants to others, especially to its subsidiary companies is the proper one as stated by Allen, J., in *Walls v. Strickland*, 174 N. C. 299, 93 S. E. 857, which was to compel a telephone public service company to discharge its duties impartially and without discrimination. The defendant in that case pursued exactly the same course as in this in regard to the jurisdiction of the court, and "excepted and appealed upon the ground that telephone companies, being subject to the control and regulation of the Corporation Commission, the courts have no jurisdiction of the action." In that case Judge Allen said:

"The error in the position of the defendants is in failing to distinguish between the regulation and control of telephone companies which, as to individuals and corporations, are committed by statute to the Corporation Commission (Rev. Sec. 1096, c. 966, Laws 1907) whether exclusively so or not we need not say, and the refusal to perform a duty to the plaintiff arising upon facts that are established. If the duty exists upon the facts found, there is nothing for the Corporation Commission to *hear* investigate, and it only remains for the courts to compel performance of the duty.

"The question was considered in *Godwin v. Telephone Company*, 136 N. C. 259 [48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203], prior to the amendment of 1907, it is true, but when, as said in the opinion, telephone companies were placed by the Corporation Commission Act 'on the same footing as to public use as railroads,' and it was then held that telephone companies, serving the public, must discharge their duties impartially and without discrimination, and that the writ of mandamus issued by the courts was the proper remedy to enforce the performance of the duty. * * * This case was approved in *Telephone Co. v. Telephone Co.*, 159 N. C. 16 [74 S. E. 636], decided after the amendments of 1907, and the jurisdiction to enforce performance of a duty by mandamus was recognized and exercised."

In *Telephone Co. v. Telephone Co.*, 159 N. C. 11, 74 S. E. 639, Hoke, J., said:

"In regard to the form of remedy available where, as in this state the same court is vested with both legal and equitable jurisdiction there is very little difference in its practical results between proceedings in mandamus and by mandatory injunction; the former being permissible when the action is to enforce performance of duties existing for the benefit of the public, and the latter being confined usually to causes of an equitable nature and in the enforcement of rights which solely concern individuals. High on Injunctions (4th Ed.) Sec. 2. Owing to the public interests involved, in controversies of this character, it is generally held that mandamus may be properly resorted to." *Mahan v. Telephone Co.*, 132 Mich. 242, 93 N. W. 629; *Yancy v. Telephone Co.*, 81 Ark. 486, 99 S. W. 679, 1

Ann. Cas. 135; *Godwin v. Telephone Co.*, 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203.

[7] The defendant asserts that it has a right to select customers to whom it will sell current and power and to discriminate at will as to its prices. To this it may be said:

First. The General Assembly declares "all water power, hydroelectric power and water companies now doing business in this state, whether organized under general or private laws of this state, or under the laws of any other state or country, shall be deemed to be public service companies and subject to the laws of this state regulating public service corporations."

Second. It enjoys the privileges and has accepted the benefits of the right of eminent domain.

275 Third. It has expressly devoted its property to the public use over a period of ten years by connecting its lines with and furnishing electric current and power to other public service corporations, as well as to the plaintiff, and to municipalities, with a knowledge that the current so purchased was being resold for the benefit of the inhabitants of the various cities, and its property has therefore become affected with a public use.

Fourth. It enjoys a monopoly of the hydroelectric business at Salisbury and in Western North Carolina.

Suppose a railroad corporation should have the power at will to charge one set of merchants at a given town a higher price than it charges others under like conditions, how long would it be before those charged the higher price would be forced out of business? Yet a railroad is by no means as much a monopoly as the Southern Power Company, for in many towns there are competing railroads, but in this case it appears by the averments of the complaint, which are admitted by the demurrer, that throughout the territory where the defendant operates there is no other hydroelectric power, and that plants operated by coal cannot compete in prices.

At the same point and under like conditions defendant must make the same charges to all alike. It is only on these terms that a monopoly is endurable at all. If it has not enough power at any one point for all applicants, it is its duty to give "millers turn"; that is, to furnish water power for heat and lighting in the order in which the applicants apply for contracts, and at the same price to all whom it furnishes.

That hydroelectric companies must furnish at the same price all parties without discrimination, under like conditions, is held in *Waterworks Co. v. Brown*, an Alabama case which is reported in 191 Ala. 457, 67 South. 613, L. R. A. 1915D, 1086, with copious notes, all of which are to that purport.

[8] Mandamus is the proper and only remedy to compel the defendant to continue to furnish power and light to the plaintiff company on the same terms that it is furnishing others under like condition.

276 The real point in this case is not whether the rates charged any one are exorbitant, nor is it sought to have the rates

fixed by the courts. The sole object of this proceeding is to forbid discrimination between purchasers in like conditions.

But as much was said in the argument and in the pleadings as to the charges, it may be well to translate into everyday language the rates set out in the pleadings and in the arguments:

One thousand watts is a kilowatt, and 1,000 watts an hour is a kilowatt hour or Kw. H. The rate of 4 mills per Kw. H. (at which the Southern Power Company obtains its current from its subsidiary company, the Great Falls Company) amounts to nearly 3 mills per horse power per hour. A horse power is 746 watts, or, roughly, three-fourths of a kilowatt.

The rate of 11 mills per Kw. H. at which the defendant had been reselling its power to the plaintiff, and is still selling it to many other companies, is 8.21 per H. P. per hour, a profit of about 275 per cent.

The rate of 1.88 cents at which the defendant now offers to sell its power and current to the plaintiff is 1.40 cents per H. P. per hour, or a profit of nearly 470 per cent.

The rate of 15 cents (i. e., 150 mills per Kw. H., at which some local companies resell to the individual consumer, amounts to 11 1-15 cents per H. P. per H. which is a profit by the latter of 800 per cent., as alleged in defendant's answer.

As the Great Falls Company must make a profit to pay its interest and dividends, when it sells to the Southern Power Company at 4 mills, it must follow that there is an almost incalculable profit taken out of the public between the actual cost of the power furnished by the Great Falls Company to the Southern Power Company (at a profit) at the figure of 4 mills and the 11 1-5 cents, or 112 mills per H. P. per hour, charged consumers of the lights in the towns when they pay 15 cents per kilowatt per hour, or 11 1-5 cents per H. P. per H. The current when used by the consumer at his home in the city will cost approximately $37\frac{1}{2}$ times the original 4 mills per kilowatt (which is 3 mills per H. P. per hour) paid by the defendant Southern Power Company to the Great Falls Company, its subsidiary company, and the Great Falls Company has
277 out of the price which it charges the Southern Power Company already made a big profit, out of which they pay interest and dividends on its heavily watered stock and bonds.

[9] The great profit made by the initial company in generating power is nowhere better proven, aside from the allegations in the complaint and answer in this case, than in the recent report on the Water Power Hearing in Congress, which shows that in Canada, under the reforms instituted by government in restricting the profits, water power and lights are now furnished at $1\frac{1}{4}$ cents per Kw. H. (kilowatt hour) to consumers instead of 15 cents, which is the rate many consumers in this state are now paying for lights and power from the local light and power company. The answer of the defendant in this case claims that the plaintiff and other similar companies are reselling to their patrons at 800 per cent. profit over the price they are paying to the defendant. It is but fair to say, however, that the local companies have very heavy expenses necessarily,

and whether the 800 per cent. advance on the prices they are paying is unreasonable or not does not arise in this case.

The allegation is not proven, and is not admitted by demurrer or otherwise. But, if true, the remedy is by application to the Corporation Commission to fix reasonable rates. Extortion by the plaintiff, if shown, will not justify discrimination by the defendant.

As the defendant claims that it must advance its prices to the plaintiff beyond the 1.1 which it has been charging to the plaintiff, and which is 275 per cent. over what it pays the Great Falls Company, and claims therefore that it must increase its charge to the plaintiff to 1.88 (which is 500 per cent. of the cost to it of the power), it is proper to observe that the operations of the defendant Southern Power Company does not call relatively for so large a number of men or other expenses, and that at the charge to the plaintiff of 1.1 it is shown that it has paid large dividends on its greatly inflated stock and bonds.

If the profits, which it clearly appears are taken out of the public by the defendant and its subsidiary companies are possible now, what will be the result if this enormous and steadily growing aggregation of wealth were permitted to charge its own rates, as it claims it has a right to do, without supervision by governmental authority, and has full power to discriminate against those municipal and industrial plants and factories which it may desire to crush out and buy? There must be considered, too, that with the constantly decreasing competition from the coal supply, which must be conserved to prevent exhaustion, and which is so frequently interrupted by strikes, the power the defendant claims of unrestricted rates and of absolute right to discriminate between purchasers would make it a despotism beyond a parallel in history. It must be remembered that the men who are organizing this mighty power and moving on to their consummation are the same who organized the American Tobacco Company with a capital of \$350,000, and in a few years made it into a combination of \$350,000,000, and that the Congress and the Supreme Court of the United States were forced to take hold and cause its dissolution as an enemy of the republic. The history of that movement and the names of the men indicted, 29 in number, among them the leaders in the organization, are set out in *United States v. American Tobacco Co.*, quoted above, and more than one of the leaders in the movement appear as defendants in the proceedings to dissolve the Standard Oil Company, which is reported in the same volume (221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734) of the United States Supreme Court Reports.

The highest considerations of the public welfare require that the rates of this company and their subsidiaries and the rates of those who, like the plaintiff, resell the current for light and power shall be strictly supervised and reduced to a reasonable profit.

[10] But, as already said above, the sole question in this case is not what is a reasonable rate, nor are the courts called upon to fix the rate (not in the first instance at least), but shall the defendant

be required to sell its current and power to all alike, without discrimination in prices, when under like conditions?

The court below properly overruled the demurrer.

Affirmed.

279 Read the above Decision carefully. It answers the contentions of the Southern Power Company in full. North Carolina Public Service Company. Chas. B. Bole, President.

"Defendant's Exhibit 16."

*Contract Between N. C. Public Service Co. and City of High Point,
Dated Oct. 19, 1909.*

This contract made and entered into this the 19th day of October, 1909, by and between the North Carolina Public Service Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, hereinafter referred to as the Company, party of the first part, and the City of High Point, a municipal corporation, created under the laws of said state, hereinafter referred to as the City, party of the second part, Witnesseth:

Whereas the said Company is engaged, among other things, in the business of selling power in the form of electric current and furnishing arc lamps and arc lamp systems for the purpose of lighting streets of municipalities; and

Whereas the said City of High Point is desirous of purchasing electric current and having installed and operated in said city an adequate arc lamp system for the purpose of lighting its streets: and

Whereas the parties hereto are desirous of contracting each with the other upon the terms hereinafter expressed.

Now therefore in consideration of the mutual stipulations, promises and agreements hereinafter set out, the said parties hereto do hereby contract each with the other as follows:

1.

The said Company hereby contracts and agrees to sell to the City for a period of ten (10) years from and after the first day of December, 1909, all such power in the form of electric current as
280 may be required by said City for the purpose of operating its incandescent lighting system, said electric current to be delivered to the City on the bus bars of the Company's switch-board at an approximate pressure of 2,300 volts and to receive in full payment therefor two and one-half (2½) cents per K. W. hour, as measured by approved recording watt meters, said meters to be furnished by the Company.

2.

And the company hereby contracts and agrees to use its best effort and endeavors to furnish to the City at all times, both day and night, a continuous flow of electric energy of the pressure of 2,300 volts as aforesaid, but it is expressly understood and agreed that the

Company shall not be liable for any interruptions in the flow of said current, which are brought about by causes over which it has no control.

3.

The said company does hereby further contract and agree to complete, equip and install within the corporate limits of the City of High Point, an electric arc light system of not less than one hundred lamps, said lamps to be what is known as the Enclosed Luminous Lamps, manufactured by the General Electric Company, of the nominal capacity of 2,000 candle power per lamp, and to keep said lamps burning all night and every night in the year for the period of ten (10) years from and after the first day of December, 1909, upon the City paying to the Company for the service thus rendered the sum of sixty (\$60.00) dollars per annum for each lamp, in equal monthly instalments, payments to be made on or before the tenth day of each month succeeding the month in which service is furnished as aforesaid.

4.

And the said company does further contract and agree that in the event the said City should, at any time during the life of this contract desire more than one hundred (100) lamps, that it will
281 install, or cause to be installed, such number of lamps of the quality and kind as aforesaid, as the City may desire, and will cause them to be kept burning as provided in paragraph third, next above, at the rate of Sixty (\$60.00) dollars per annum for each additional lamp so installed and operated, payment therefor to be made as above set out.

5.

And the said company does further agree to build its lines for said arc lamps system, and to locate the lamps hereby agreed to be installed and operated at such points within the corporate limits of the City of High Point as may be designated by the Commissioner of the Lights and *Lights*, or such other officer as may be named for such purpose by the City Council of the City of High Point, and that said lamps shall at all times be kept in such order and repair, and the lines in such a state of efficiency and the electric current furnished shall be of such a character and quantity as to give the best service capable of being given with said lamps according to electrical engineering standards and practices.

6.

And the company hereby agrees at any time during the life of this contract upon request of the City to change the location of any lamp, or lamps which may have theretofore been located in accord-

ance with the terms hereof, provided all expense attendant upon such change of location is borne and paid for by the City.

7.

And the said company does hereby further contract and agree that when the City of High Point, in accordance with the rights hereinbefore granted to the said City, to require the Company to increase its arc lighting system, shall have so increased it until it shall have installed and in use not less than two hundred and fifty (250) arc lamps that thereafter the price for operating each lamp in the manner above stipulated shall be fifty-eight (\$58.00) 282 Dollars per annum, and should the system be increased until there shall have been installed not less than three hundred and fifty (350) arc lamps, the price shall be reduced to fifty-six (\$56.00) Dollars per annum for each lamp.

8.

And the said company does further agree that in the event of its failure to keep any lamp burning as above stipulated, that the City shall have the right to deduct from the monthly bill to be rendered hereunder double the amount the Company would have received had said lamps been burning all night as contemplated herein; and that the amount shall be determined by the number of hours such lamps are burning and shall be calculated upon the basis of said lamps being required to burn twelve hours per day for three hundred and sixty five (365) days in the year, such amount to be deducted to be in the nature of a penalty for the failure of the Company to perform its contract, and also, as liquidated damages on account of such failure.

9.

And the said company hereby further agrees to allow the City the right to use, during the life of this contract all the poles which the Company may now own, or which it may hereafter erect or require, such use on the part of this City being for the purpose of stringing wires employed in distributing electric current of the incandescent system owned by said City; it being understood that all wires of the City hereafter placed on the Company's poles shall be placed on the top gains thereof; and that any change in the City's wiring which may be made in the future shall locate its wires on the top gains of the Company's poles.

10.

And the said city, in consideration of the foregoing, does hereby contract and agree to purchase from the Company for a period of ten (10) years from and after December 1st, 1909, all such 283 energy in the form of electric current as it may require for operating its incandescent lighting system, and to take the

same at the bus cars of the company's switch-board at an approximate pressure of 2,300 volts and pay therefor, on the tenth day of the month succeeding the month in which the electric current is furnished, two and one-half ($2\frac{1}{2}$) cents per K. W. hour, as measured by approved recording watt meters.

11.

And the said city does hereby contract and agree to pay the Company for a period of ten (10) years from and after December 1st, 1909, for the arc lights hereinbefore agreed to be installed the sum of Sixty (\$60.00) Dollars per annum for each lamp for not less than one hundred (100) arc lamps, and when the system shall have been increased to two hundred and fifty (250) lamps, to pay therefor the sum of Fifty-eight (\$58.00) Dollars per annum for each lamp so operated, as above, and when the system shall have reached three hundred and fifty (350) lamps to pay therefor the sum of Fifty-six (\$56.00) Dollars per annum for each lamp installed and operated as above set out, payments to be monthly as set out in paragraph three, hereof and in case of the outage of any of said lamps to accept from the Company as full liquidated damages double the amount the City would have been required to pay for the use of said lamp, had it been burning based upon said lamps burning twelve hours per day for three hundred and sixty five (365) days in each year.

12.

And it is further mutually agreed by and between the parties hereto that should the City fail for ten (10) days to pay the monthly bill rendered by the Company, that the Company shall have the right to discontinue the service hereinbefore provided to be furnished, but any failure upon the part of the Company to discontinue the service for the non-payment of bills, shall not be construed as a waiver of its right to so discontinue, but it may at any time, for the reason aforesaid discontinue said service notwithstanding the fact that it had theretofore on one or more occasions failed to exercise such right when it would have been legally entitled so to do.

13.

And it is further mutually agreed that each of the parties hereto shall have the right at all times after giving to the other party three days' notice in writing of its intentions to disconnect the recording watt meters, and to have them tested to determine their accuracy or error by a competent and wholly disinterested person, firm or corporation to be selected by the party desiring the test. And if said watt meter shall be found to record more than three (3) per cent in excess of the true number of K. W. hours, the cost of the test shall be paid by the party of the second part, and if the error does not exceed three (3) per cent the cost of testing shall be paid by the party in whose behalf the test is made.

14.

And it is further mutually agreed that the number of K. W. hours received by the party of the second part during the period in which the recording watt meters are being tested, shall be assumed to be equal to the number of K. W. hours received during a similar period immediately after the watt meters have been tested and returned to service or replaced with other meters.

15.

And it is further mutually agreed that this contract and all the provisions thereof shall go into effect on December 1st, 1909, and continue for the period of ten (10) years thereafter.

16.

And it is mutually covenanted by and between the parties hereto, this contract shall insure to the benefit of and be binding upon the parties hereto, and their respective successors and assigns, that
 285 no other party or parties, other than those above set out, shall have any right hereunder.

In witness whereof, the parties have caused these presents to be executed in duplicate in their respective corporate names by their proper officers, the party of the first part having been therefore authorized as to contract under its charter and by-laws, and the party of the second part having been heretofore so authorized under and by virtue of a resolution of its City Council, passed at a regular meeting held in its Council Chamber in the City of High Point on the 18th day of October 1909. North Carolina Public Service Company, by ———. City of High Point, by ———, Mayor.

"Defendant's Exhibit 17."

*Contract Between N. C. Public Service Co. and City of High Point,
 Dated June 15, 1914.*

STATE OF NORTH CAROLINA,
 County of Guilford:

This contract made and entered into this the 15th day of June, 1914, by and between the North Carolina Public Service Co., a corporation duly organized and existing under and by virtue of the laws of State of North Carolina, hereinafter referred to as the Company, party of the first part, and the City of High Point, a municipal corporation created under the laws of the said state, hereinafter referred to as the City, party of the second part, Witnesseth:

That whereas, the said party of the first part is engaged in the business of selling and distributing power in the form of electric

current for power purpose in the City of High Point and elsewhere;
and

286 Whereas, the said City of High Point is desirous of obtaining power in the form of electric current, delivered in the manner hereinafter set out for the purpose of driving its motors for pumping and other purposes, and whereas the already existing contract for power, in the form of electric current, between the party of the first part and the party of the second part, covers only "all such power in the form of electric current as may be required by said city for the purpose of operating its incandescent lighting system;" and whereas the City of High Point desires that the North Carolina Public Service Co., make the large financial outlay necessary to deliver the power herein specified; and

Whereas the parties hereto are desirous of contracting each with the other upon the terms hereinafter expressed;

Now therefore, in consideration of the mutual stipulations, promises and agreements hereinafter set out, the said parties hereto do hereby contract each with the other as follows:

1.

The said company hereby contracts and agrees to sell the City for a period of five (5) years from and after June 15th, 1914, all such power in the form of electric current as may be required by the said city for the purpose of operating its pumps situated at the reservoir just east of the High Point Normal & Industrial Colored School along the Main Line of the Southern Ry.; also for operating its pumps located at the sewerage disposal plant on Liberty Street, first ward near the Rock Quarry, also for operating its pumps located at the sewer disposal plant on Centennial Ave., all in or about High Point, said electric current to be delivered to the city at the aforesaid points and more particularly located at the points on the outside walls of the pump buildings of the city, where the wires of the Company shall connect the wires of the said City, which said point shall be hereinafter known as the delivery point, and the City hereby agrees to purchase and receive from the Company, at said pumping locations and at said delivery points, sufficient
287 power in the form of electric current for use by the City for driving all motors which may be installed for pumping purposes, at the rate of one and seventy-five one-hundredths (1.75) cents per K. W. H., which said rate the City agrees to pay for all current consumed, it being understood and agreed that the City shall pay a minimum bill of Ninety (\$90) Dollars per month in the event the current consumed at the above rate shall not amount to the said sum, such minimum charge to reimburse the Company transformer losses, installation of equipment, etc., being a "Readiness to serve" charge. Payments shall be made by the City to the Company promptly upon bills rendered the first of each month for all current consumed during the preceding month.

2.

The Company agrees to deliver said power for driving motors as alternating current, on what is known as a three phase distribution of approximately 60 cycles periodicity and at approximately 2,200 volts for all motors.

3.

And the said City further agrees that it will install all such necessary transformers, etc., as may be required to step down the voltage to a pressure less than that delivered by the Company. The said Company will furnish, install, and maintain in good condition at convenient points, commercially accurate, Recording Watt Meters, such as may be necessary to register the current consumed by the City, the said meters to be installed at a point to be mutually agreed upon and to be installed ahead of all apparatus of the City.

4.

And the said — hereby further agrees to furnish all repairs as may be necessary to its power distribution system. It being understood by this agreement that when the Company shall have delivered to the City energy in the form of electric current of
288 the pressure represented by the voltage hereinbefore set out, it has complied with the terms of this contract.

5.

And it is hereby mutually agreed by and between the parties hereto that neither party hereto shall be responsible for accident or for injury or damage to the machinery, apparatus, appliances, or other property of the one caused by lighting, defects in or a failure of the machinery, apparatus or appliances of the other; and it is expressly understood and agreed that said Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for and that the said Company shall not be in any way responsible for the transmission or control of said electric power beyond such point of its delivery to said City, and shall not, in any event, be liable for damages, or injury to any person or property whatsoever, arising, accruing or resulting from, in any manner, the receiving, use, consumption, application or distribution by said City of said electric power except such as may result from the negligence of said Company, and said City shall except as aforesaid, hold and save harmless the Company from any and all liabilities, or liabilities to any person or corporation incurred or sustained by said Company by reason thereof or of any negligence or misconduct on the part of the City, its officers, agents, servants or employees.

6.

And the said Company shall provide regular and uninterrupted power service, and said City will regularly and continuously receive, use and apply the same; but in case the service of the said Company shall be interrupted, suspended or shall fail, or in case said City shall be prevented from receiving, using and applying said electric power, as to either party by reason of or through strike, stoppage of labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any court or judge granted in any bona fide adverse legal proceedings or action, or any civil authority, explosion, act of God or of the public enemies or any cause reasonably beyond the control of either party and not attributable to its neglect, then and in such event the Company shall not be obligated to deliver said electric power hereunder during such period, and shall not be liable for any damage or loss resulting from such interruption, prevention, suspension or failure, and said City shall be obligated to receive or pay for power during such period; and in any and all such event or events, the party suffering such interruption, prevention, suspension or failure shall be prompt or diligent in removing and overcoming such cause or causes thereof, provided, however, that either party whose plant shall suspend operation by reason of accident to its machinery, plant or system, shall proceed at once to repair the same within a reasonable time, and failing shall be liable to the other as though no such limit or exemption had been fixed.

7.

And it is hereby mutually agreed by and between the parties hereto that this contract shall take effect as of the date when executed, and shall enure to the benefit of and be binding upon the parties hereto and their respective successors, and assigns and shall continue for a period of five years from and after said date and thereafter, until either party hereto shall have served upon the other party ninety days' written notice of its intention to terminate this agreement;

The Company further agrees to deliver current and the City agrees to accept same under this agreement not later than 30 days from the execution hereof.

8.

It is distinctly agreed and understood that the power herein contracted for shall not be resold either directly or indirectly by said City without the written consent of the said Company first obtained in writing.

In witness whereof the parties hereto have caused this contract to be executed in duplicate in their respective names by their respective duly authorized officers, the day and year first above written.

290 Accepted for North Carolina Public Service Co., by C. H. Andrews, Mgr.

Approved by E. C. Deal, V. P. & G. Mgr.

Accepted for City of High Point, by Fred N. Tate.

As authorized by the City council at meeting held June 1st, 1914.

"Defendant's Exhibit 18."

*Agreement Between N. C. Public Service Co. and City of High Point,
Dated Aug. 12, 1914.*

NORTH CAROLINA,
Guilford County:

This agreement, Made and entered into this the 12th day of August, 1914, by and between the North Carolina Public Service Company, a corporation duly chartered and organized under the laws of the State of North Carolina, with its principal office in the City of Greensboro, said County and State, hereinafter referred to as "The Company," party of the first part, and the City of High Point, a municipal corporation created and existing under and by virtue of the laws of said State, hereinafter referred to as "The City," party of the second part, witnesseth:

Whereas, there is about to be installed a system of ornamental street lighting extending along and in the vicinity of Main Street between English and Commerce Streets, consisting of Sixty (60) or more ornamental street lighting posts, said posts being what is commercially known as "White Way Pedestals," each post having
291 five (5) lamps, the light giving quality of each lamp to equal the present standard 60 watt mazda lamp, and,

Whereas, The City of High Point desires to provide for the maintenance and operation of the said system of ornamental street lighting by the said Company.

Now, therefore, in consideration of the premises and the mutual covenants and agreements herein contained, it is contracted by and between the parties hereto as follows, to-wit:

1st. The Company agrees to furnish and install at convenient points along the street as directed by the city and approximately equal distances apart, the said Sixty (60) or more ornamental lighting posts above mentioned, which said posts are to be what is known as White Way Lighting posts and to furnish and install all pedestals, lamps, wires, etc., necessary to complete the system.

2nd. The Company further agrees, during the continuance of this contract, to maintain and operate the said system of street lighting to be installed as herein above set forth; shall renew the lamps from time to time as necessary; renew the broken globes and keep the posts painted, and keep the globes and poles clean, and shall furnish the current for lighting and operating said lamps and turn on the lamps and turn them off from time to time, and said lights to burn from dusk dark until 11:30 o'clock P. M., on each night in the year, save

and except Saturday nights on which nights said light shall burn until 12:00 o'clock Midnight.

3rd. The Company agrees that all wires and cables supplying current to these lights shall be maintained in a first class condition.

4th. The Company further agrees to exercise due diligence to keep the lamps burning with minimum amount of outage, penalty for said outage to be on same basis as under present arc light contract now in operation.

292 5th. The terms of this contract shall commence, as to each post from the date the lamps on said posts are first lighted and shall continue, until Jan. 1, 1924, and from year to year thereafter, subject, however, to the right to either party hereto to terminate this contract at any time after Jan. 1st, 1924, by giving the other party written notice at least three (3) months prior, fixing in such notice the termination of this contract.

6th. The party of the first part further agrees to undertake the work of installing ornamental street lighting system as herein described as soon as necessary material can be obtained, with reasonable promptness, and carry to completion and turn on and put same into service without any unnecessary delay.

7th. The party of the first part agrees further to keep burning all arc lights now located in what is to be the "White Way" district from 11:30 o'clock P. M. until the street arc system is turned off every night except Saturday night, and on Saturday nights from 12:00 o'clock, midnight, until the street arc system is turned off; and it is understood that the charge of \$35.00 per year for each "pedestal" hereinafter mentioned, shall include the arc light service mentioned in the paragraph.

8th. The city desiring to beautify the street as far as possible by the elimination of unsightly wooden poles, the Company agrees further to substitute standard tubular steel poles for its wooden poles now located along the "White Way" district; said steel poles to be of sufficient size and height to carry the street-railway, light, and power wires of the Company; also the lighting and signal wires belonging to the City; and the telephone wires and cables belonging to the Telephone Companies, all located along said district.

9th. It is further understood and agreed between the parties hereto that said Sixty (60) or more pedestals hereinbefore referred to, and to be furnished and installed by the Company are the property of the Company and are to remain the property of the Company.

293 10th. The City is to pay the Company for the maintenance and lighting of said lamps as hereinbefore provided, at the rate of Thirty-five Dollars (\$35.00) per year for each pedestal, said sum to be paid by the City in equal monthly installments on or before the 10th day of each month during the term of this contract for the lamps in use during the preceeding month.

11th. The substitution of steel poles mentioned in paragraph eighth is not in any way to be construed as a waiver of any rights the City now enjoyed under a former contract to have the use of poles for its wires.

In witness whereof, the parties hereto have caused these presents to be executed in duplicate in their respective corporate names by their proper officers and with their respective corporate seals affixed, the Company having been heretofore authorized to contract under its charter and by-laws and by resolution of its Board of Directors, and the City having been heretofore so authorized under and by virtue of a resolution of its Mayor and Council, passed at a meeting held in its council chamber in the City of High Point, on the 12th day of August, 1914. North Carolina Public Service Company, by E. C. Deal, Vice-Pres. & Gen. Mgr. Witness as to North Carolina Public Service Company, Dred Peacock. City of High Point by Fred N. Tate, Mayor. Witness as to City of High Point, Dred Peacock.

294

Copy of Resolution.

"Whereas, the officers and management of the Company entered into an agreement with the City of High Point to construct a street lighting system known as the "White Way," and the same has now been installed according to the contract;

"Now, therefore be it resolved, that said contract with the City of High Point covering the construction of said White Way System and the installation of same, is hereby in all things ratified, approved, and confirmed.

"And further resolved that a copy of this resolution be filed with the proper authorities of the City of High Point."

I hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Board of Directors of the North Carolina Public Service Company at a meeting held the 17th day of February, 1915, at 2 P. M. at No. 43 Cedar Street, New York City. L. H. Hole, Jr., Secretary. March 13, 1915.

Defendant's Exhibit No. 19.

*Contract Between N. C. Public Service Co. and City of High Point,
Dated March 2, 1920.*

NORTH CAROLINA,
Guilford County:

This contract, made and entered into this the 2nd day of March, 1920, by and between the North Carolina Public Service Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, hereinafter referred to as the Company, party of the first part, and the City of High Point, a municipal corporation, created under the laws of the said State, hereinafter referred to as the City, party of the second part; witnesseth:

That whereas, the contract made and entered into on the 19th day of October, 1909, between the said Company and the said City, for electric current required by the said City, for the purpose of operating its incandescent lighting system, did expire on the first

day of December, 1919, and whereas, it is the desire of both parties to renew said contract, except as herein modified, for a further period of five (5) years, beginning January 1st, 1920; and,

Whereas, the contract made and entered into between the said Company and the said City on the 15th day of June, 1914, for power in the form of electric current required by the said City for the purpose of operating its pumps situated at the reservoir just East of the High Point Normal and Industrial colored school, and its pumps located at the sewerage disposal plant on Liberty Street, and its pumps located at the sewer disposal plant on Centennial Avenue, expired on June 15th, 1919, and whereas, both parties are desirous of renewing the said contract, except as herein modified, for another period of five (5) years, beginning January 1st, 1920; and,

Whereas, in addition to the power required and heretofore and now furnished under the contracts above set out, the City is desirous of obtaining more power in the form of electric current for the purpose of operating its pumps and for other purposes, said pumps situated at its pumping station on Deep River, and whereas, the Company is desirous of furnishing said additional power on the terms and conditions hereinafter set forth.

Now, therefore, in consideration of the mutual stipulations, promises and agreements hereinafter set out, the said Company and the said City do hereby contract with each other as follows:

296

(1)

The contract, made and entered into on the 19th day of October, 1909, by and between the said Company and the said City, for electric current required by the said City for the purpose of operating its incandescent lighting system, which expired on the 1st day of December, 1919, but under which contract power has been furnished to the City until the present time, be and the same is hereby renewed and extended for the period of five (5) years, beginning January 1st, 1920, and the said Company and the said City hereby mutually agree that the terms of said former contract shall be binding upon each of them during the said period of five (5) years, or until January 1st, 1925, except that the City shall be entitled to a discount of five per cent (5%) for current used for incandescent lighting purposes under said contract, in case bills for such current are paid by the 10th of the month following the use thereof; and except further in lieu of the rates quoted in said former contract, in paragraphs 3, 4 and 7, the prices paid by Greensboro for arc lights, shall apply, which are as follows:

Up to 250 arc lamps.....	\$58.00 per lamp, per year
From 250 to 350 lamps.....	56.00 per lamp, per year
Over 350 arc lamps.....	54.00 per lamp, per year

(2)

The contract, made and entered into between the said Company and the said city, on the 15th day of June, 1914, for power in the

form of electric current required by the City for the purpose of operating its pumps situated at the reservoir just East of the High Point Normal and Industrial colored school, and its sewerage disposal plant on Centennial Avenue, which expired on June 15th, 1919, but under which contract power has been continuously furnished to said City until the present time, be and the same is hereby renewed and extended for a period of five (5) years, beginning January 1st, 1920, and the said Company and the said City hereby mutually agree that the terms of the said contract shall be binding upon each of them during said extended period of five (5) years, or until January 1st, 1925; except by agreement, the City of High Point shall be entitled to a discount of five per cent (5%) on all current consumed for pumping purposes, under this particular contract, provided, only, that such bill is paid by the 10th day of the month succeeding the use thereof;

(3)

In addition to the power in the form of electric current, called for in the two foregoing contracts, the said Company hereby contracts and agrees to sell to the City of High Point, as soon as required after completion of plant, and until the 1st day of January, 1925, all such power in the form of electric current as may be required by the said City for the purpose of operating its new pumps situated at its new pumping station on Deep River, said electric current to be delivered to the City at its reservoir just East of High Point Normal and Industrial colored school, along the main line of the Southern Railway, which said point shall be hereafter known as the Delivery Point, and the said City hereby agrees to purchase and receive from the Company at said Delivery Point, for the said period of time, sufficient power in the form of electric current for use by the City, for driving all such motors which may be installed for pumping purposes at the rate of 1.75 per Kilowatt hours, at which said rate, the said City agrees to pay for all current consumed; subject, however, to a discount of five per cent (5%) on all current consumed for pumping purposes, under this particular new contract, only in case that the bill for said current is paid by the 10th of the month succeeding the use thereof.

It is further agreed between the parties hereunto, that if at any time any controversy shall arise between the said City and said Company, as to the failure of either party hereto to perform any stipulation on its part, contained in this agreement, the same shall be referred to arbitrators, one to be selected from the Board of Aldermen of the said City, and other by the Company, and in event of their failure to agree, these two to select a third party, and the award of said arbitrators, or any two of them, shall be final and binding on the parties hereto.

It is further stipulated and agreed by the Company that, if on account of changed conditions, or for any other reason, the City shall be of the opinion that the rates stipulated in the renewed contract, or provided for in this supplemental contract, are unreasonable, the question may be referred to the State Corporation Com-

mission for adjudication and settlement, and the existence of this contract for a term of years will not be pleaded by the Company as a bar to the City's rights to have the Corporation Commission review and determine the reasonableness of the rates herein provided for.

The Company agrees to deliver said power for driving motors as alternating current of three phase distribution of approximately 60 cycle periodicity and at approximately 2,200 volts.

Said Company will furnish, install and maintain in good condition at the delivery point, commercially accurate recording watt meters, such as may be necessary to register the current consumed by the City.

Said City hereby further agrees to furnish all repairs as may be necessary to its power distribution, it being understood by this agreement that when the Company shall have delivered to the City energy in the form of electric current at the pressure represented by the voltage herein set out, it has complied with the terms of the contract.

And it is hereby mutually agreed by and between the parties hereto that neither party shall be responsible for accident or for injury or damage to the machinery, apparatus, appliances, or other property of the one, caused by lightening, defects in, or a failure of the machinery, apparatus or appliances of the other; and it is expressly understood and agreed that said Company is merely a furnisher of electric current deliverable at the Delivery Point hereinbefore provided for, and that the said Company shall not be in any way responsible for the transmission or control of said electric power beyond such point of its delivery to said City, and shall not

299 in any event, be liable for damages, or injury to any person or property whatsoever, arising, accruing or resulting from, in any manner, the receiving use, consumption, application or distribution by said City of said electric power, except such as may result from the negligence of said Company, and the said City shall, except as aforesaid, hold and *have* harmless the Company from any and all liabilities, or liabilities to any person or corporation incurred or sustained by said Company, by reason thereof, or of any negligence or misconduct on the part of the City, its officers, agents, servants or employees.

And the said Company shall provide regular and uninterrupted power service, and said City will regularly and continuously receive, use and apply the same; but in case the service of said Company shall be interrupted, suspended or shall fail, or in case said City shall be prevented from receiving, using and applying said electric power; as to either party by reason of or through strike, stoppage of labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any court or judge granted in any bona fide adverse legal proceedings, or action, or any civil authority, explosion, act of God or of the public enemies, or any cause reasonably beyond the control of either party, and not attributable to its neglect, then and in such event the Company shall not be obligated to deliver said electric current

hereunder during such period, and shall not be liable for any damage or loss resulting from such interruption, prevention, suspension or failure, and said City shall not be obligated to receive or pay for power during such period; and in any and all such event or events, the party suffering such interruption, prevention, suspension, or failure, shall be prompt or diligent in removing and overcoming such cause or causes thereof, provided, however, that either party whose plant shall suspend operation by reason of accident to its machinery, plant or system, shall proceed at once to repair the same within a reasonable time, and failing to do so, the limit of or exemption from liability, as fixed in this paragraph, shall not apply, and the party so failing shall be liable to the other as though no such limit or exemption had been fixed.

In witness whereof, the parties hereunto have caused this contract to be executed in duplicate, in their respective names, by
300 their duly authorized officers, this the 2nd day of March, 1920. North Carolina Public Service Company, by Chas. B. Hole, President. (Seal.) City of High Point, by D. R. Stanton, Mayor, by R. L. Pickett, City Manager. Attest: J. J. Lindsay, Asst. Secy. & Treas.

By motion of J. W. Hedreck, duly seconded, a contract was entered into between the North Carolina Public Service Company and the City of High Point, covering the necessary electric current, for all pumping purposes, incandescent and arc lighting, for a period ending January 1st, 1925, copy of which is hereto attached and ordered to be spread upon the minutes, the original to be executed by the Mayor and the City Manager, and delivered to the North Carolina Public Service Company.

Bills Dated June 10, 1921.

207

Defendant's Exhibit 20.

Bill Dated June 10, 1921.

North Carolina Public Service Co.

City of High Point, 1st Ward—City. High Point, N. C.

No discount on this bill after June 10, 1921.

Gas:

Net
charge.

Discount 10c. per 1,000 cu. ft. Reading:.....	00	
Service charge 75c. per month Reading:.....	00	
	— 00 cu. ft. at —	.....
Discount.....		.....

Electric lights:

Discount of 5% on gross amount of charge.....	Reading:.....	00
Service charge \$1.00 per month	Reading:.....	00
	Discount.....	.....

Elec. flat rate:

Discount of 5% on gross amt. of charge	From — to —, No. — Watts at —.
	Discount.....

Electric power:

Discount of 5% on gross amount of charge.....	Reading 5-31 8833	
	Reading 4-30 8750 830 Kw. H. at 1.75	14.52
	Discount.....	.....

301 Sundries:

Gas Arc Rentals.....	Arcs (a) each per month.....
----------------------	------------------------------	-------

Failure to Receive Bill Does Not Constitute Claim for Discount	Total .....	.....
	Previous Balance.....	.....

Payments Received only between 8.30 A. M. and 5.00 P. M.	Grand Total.....
--	------------------	-------

North Carolina Public Service Co. Paid June 10, 1921.

"Defendant's Exhibit 21."*Bill Dated June 10, 1921.*

North Carolina Public Service Co.

City of High Point. Lighting High Point, N. C.

No discount on this bill after June 10, 1921.

		Net charge
Gas:		
Discount 10c. per 1,000 cu. ft. Reading:.....	00	
Service charge 75c. per month Reading:.....	00	
	— 00 cu. ft. at —	.....
	Discount.....	.....
Elec. lights:		
Discount of 5% on gross amt. of charge	Reading:.....	..
Service charge \$1.00 per month	Reading:.....	..
	— C- Kw. H. at —	.....
Elec. flat rate:		
Discount of 5% on gross amt. of charge	From — to —, No. — Watts at —.	
	Discount.....	.....
Indicator service:		
Discount of 5% on gross amt. of charge	From — to —, No. — Watts at —.	
	Discount.....	.....
Electric light:		
Discount of 5% on gross amount of charge.....	Reading 5-31 64032 Reading 4-30 58782 87500 Ww. H. at 2.5	2187.50
	Discount.....	.....
Sundries:		
Gas Arc Rentals.....	Arcs (a) each per month.....	.....
Failure to Receive Bill Does	Total .....	.....
Not Constitute Claim for Discount	Previous Balance.....	.....
Payments Received only between 8.30 A. M. and 5.00 P. M.	Grand Total.....	.....

North Carolina Public Service Co. Paid June 10, 1921.

"Defendant's Exhibit 22."

*Letter from N. C. Public Service Co. to High Point Hosiery Mills
Dated Feb. 3, 1915.*

February 3rd, 1915.

High Point Hosiery Mills, Piedmont Hosiery Mills, High Point,
N. C.

302 Attention Mr. Adams.

GENTLEMEN: Referring to our converence this morning in reference to your power contract, and listening to your explanations in reference to temporary cessations of factory operations at times owing to conditions beyond your control, and especially referring to the unusual demoralization of business such as recently caused by the European War, we can see some justification in giving the matter of monthly minimum, or "Ready to Serve" charge special consideration in your case. Therefore, we agree as follows:

In cases where there is a complete or partial shut down of your plant or periods of more than a week's duration, the minimum, or "ready to serve" charge will be suspended, provided you notify our office on the day of the shut down of your intention to shut down, and the approximate time or duration of shut down; and also notify us one day ahead previous to the time your factory is to start up again. This being necessary in order that the equipment used by us for serving you will be available for other purposes should we desire to use it in that way. This, together with the long term of your contract, justifies us in deviating somewhat from our "ready to serve" charge custom. Yours truly, North Carolina Public Service Company. C. H. Andrews, Mgr.

Contract Between N. C. Public Service Co. and High Point Hosiery Mills and Piedmont Hosiery Mills, Dated Feb. 1, 1915.

NORTH CAROLINA,
Guilford County:

This contract and agreement made and entered into this the 1st day of February, A. D. 1915, by and between the North Carolina Public Service Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, party of the first part, and hereinafter called the "Public Service Company," and the High Point Hosiery Mill, and Piedmont Hosiery Mills, corporations duly organized and existing under and by virtue of the laws of the State of North Carolina, and hereinafter designated "The Hosiery Mills" party of the second part, witnesseth:

That whereas, the said party of the first part is engaged in the manufacture, sale and distribution of power in the form of electric

current for lighting and power purposes in the City of High Point and elsewhere:

And whereas, The Hosiery Mills are desirous of obtaining power in the form of electric current delivered in the manner hereinafter set out for the purposes of lighting its mills, offices, buildings and grounds, and driving its motors for mechanical and other purposes:

Now therefore, in consideration of the foregoing and in consideration of the mutual promises and agreements hereinafter set out, the said parties do hereby mutually agree as follows:

1.

The Public Service Company hereby contracts and agrees to sell the Hosiery Mills for a period of ten (10) years from and after February 1st, 1915, all such power in the form of electric current as may be required by the Hosiery Mills for the purpose of operating the lights and motors situated at the High Point Hosiery Mill on English Street, High Point, N. C., also for operating the lights and motors located at the Piedmont Hosiery Mill #2, just west of the High Point Normal and Industrial Colored School near the main line of the Southern Railway, all in or about High Point, said electric current to be delivered at the Hosiery Mills at the aforesaid points and more particularly located at the points on the outside walls of the mill buildings of the Hosiery Mills, where the wires of the Public Service Company shall connect the wires of the Hosiery Mills, which said point shall be hereinafter known as the "Delivery Point," and the Hosiery Mills hereby agree to purchase and

304 receive from the Public Service Company, at said locations and at said delivery point, sufficient power for use by the Hosiery Mills for lighting its mills, buildings and grounds, and for driving all motors which may be installed in said Hosiery Mills, at the rate of 1.6c. per Kilowatt Hour (KWH), which said rate the Hosiery Mills agree to pay for all current consumed. Payments shall be made by the Hosiery Mills to the Public Service Company promptly upon bills rendered the first of each month for all current consumed during the preceding month that the Hosiery Mills will then and there, make immediate payments of the bills presented. It is understood and agreed, however, that the aggregate amount of such monthly bills shall not be less than the sum equivalent to \$12.00 per H. P. of connected load, per year, which shall be termed "Minimum Charge." Said minimum charge to be made in consideration of the advantageous rate herein contracted for and to be enjoyed by the party of the second part and agreed to by the party of the first part, and to reimburse the party of the first part for transformer losses, installation of equipment, etc., being a "Readiness to Serve" charge. It is understood and agreed, however, that nothing herein contained shall be construed so as to require the Hosiery Mills to pay as a minimum charge, a sum greater than the current actually consumed at the rate herein named amounts to, when such failure to so consume the current is the result of the inability of the Pub-

lic Service Company, thru no fault of the Hosiery Mills, to supply such current.

2.

The Public Service Company agrees to deliver such power for light on what is known as the single phase distribution at approximately 60 cycles periodicity of alternating current at approximate average of 110 volts, and deliver said power to be used for driving motors as alternating current, on what is known as a three phase distribution of approximately 20 cycles periodicity, and on approximately 220 volts for all motors or 2,200 volts where the Hosiery Mills desire to operate 2,220 volt motors. It being distinctly understood and agreed that the service furnished shall be at a voltage suitable for operating the present lighting and motor installation; and further that after the said Hosiery Mills have made their selection of the voltage of the various systems hereinbefore mentioned, they shall not have the privilege of changing said voltage without the consent of the Public Service Company first obtained in writing (the present equipment of the Hosiery Mills requires the voltage hereinbefore mentioned). Said Hosiery Mills further agree that should they use any part of said power delivered hereinunder for lighting, they will install and maintain all necessary and proper regulating and controlling devices in connection therewith.

3.

And the said Public Service Company further agrees that it will install all such necessary transformers as may be required to deliver the current at a pressure commercially known as 110 volts or 220 volts as mentioned in paragraph second thereof. The said Public Service Company will furnish, install and maintain in good condition, at convenient point, commercially accurate recording watt meters such as may be necessary to register the current consumed by the Hosiery Mills. The said meter to be installed at a point being mutually agreed upon and a separate meter to be supplied for the 2,200 volt motors, the 110 volt lighting and the 2,220 volt motor service.

4.

And the said Hosiery Mills hereby further agrees to furnish all incandescent lamps required by them, together with such renewals as may be required, and such repairs as may be necessary to its lighting and power distribution system. It being understood by this agreement that when the Public Service Company shall have delivered to the Hosiery Mills energy in the form of electric current of the pressure represented by the voltage hereinbefore set out in paragraphs second and third hereof, it has complied with the terms of this contract.

306

5.

And it is hereby mutually agreed by and between the parties hereto, that neither party hereto shall be responsible for accident for injury or damage to the machinery, apparatus, appliances, or other property of the one caused by lightning, defects in, or failure of the machinery, apparatus or appliances of the other; and it is expressly understood and agreed that the Public Service Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for, and that the said Public Service Company shall not be in any way responsible for the transmission or control of said electric power current beyond such points of delivery to said Hosiery Mills, and it shall not in any event be liable for damages or injury to any person or property, whatsoever, arising accruing, or resulting from in any manner, the receiving, use, consumption, application or distribution by said Hosiery Mills of said electric power, except such as may result from the negligence of said Public Service Company, and said Hosiery Mills shall except as aforesaid, hold and save harmless the Public Service Company from and all liability or liabilities to any person or corporation incurred or sustained by said Public Service Company by reason thereof or any negligence or misconduct on the part of the Hosiery Mills, the officers, agents, servants or employees.

6.

And the said Public Service Company shall provide regular and uninterrupted power service, and said Hosiery Mills will regularly and continuously receive, use and apply the same; but in case the service of the Public Service Company shall be interrupted, suspended, or shall fail, or in any case said Hosiery Mills shall be prevented from receiving, using and applying said electric power, as either party by reason of or thru strike, stoppage of labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military usurp power, accident, order of any court or judge granted in bona fide adverse legal proceedings, or action of any Civil authority, explosion, act of God or of the Public Enemy, or of any cause reasonably beyond the control of either party and not attributable to its neglect, then and in such event said Public Service Company shall not be obligated to deliver said electric power hereunder during such period, and it shall not be liable for any damage or loss resulting from such interruption, prevention, suspension, or failure, and said Hosiery Mills shall not be obligated to receive or pay for power during such period; and in any and all such event or events, the party suffering such interruption, prevention, suspension, or failure, shall be prompt and diligent in removing and overcoming such cause or causes thereof; provided, however, that either party whose plant shall suspend operation by reason of accident to its party whose plant shall suspend operation by reason of accident to its machinery, plant or system, shall proceed at once

to repair the same within a reasonable time, the failure to do so, the limit of or exemption from liability as fixed in this paragraph shall not apply, and the party shall be liable to the other as tho no such limit or exemption had been fixed.

7.

And it is hereby mutually agreed by and between the parties hereto that this contract shall take effect as of the date when executed, and shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, and shall continue for a period of ten (10) years from and after said date and thereafter, until either party hereto shall have served upon the other party ninety (90) days' written notice of its intention to terminate this agreement:

8.

It is distinctly agreed and understood that the power herein contracted for shall not be resold, either directly or indirectly by the Hosiery Mills without the written consent of the said Public Service Company first obtained.

In witness whereof the parties hereto have caused this contract to be executed in duplicate and their respective names by 308 their respective duly authorized officers, the day and year first above fixed. North Carolina Public Service Company, by C. H. Andrews, Mgr. In the presence of J. J. Lindsay. High Point Hosiery Mills, by J. H. A. Adams, Pres. In the presence of C. H. Andrews.

"Defendant's Exhibit 23."

*Contract Between N. C. Public Service Co. and Stehli Silk Corp.
Dated Oct. 27, 1916.*

NORTH CAROLINA,
Guilford County:

This contract and agreement made and entered into this the 27th day of October A. D., 1916, by and between the North Carolina Public Service Company, corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, party of the first part, and hereinafter called "Public Service Company," and the Stehli Silk Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and hereinafter designated the "Silk Mill," party of the second part, witnesseth:

That whereas, the said party of the first part is engaged in the manufacture, sale and distribution of power in the form of electric current for lighting and power purposes in the City of High Point and elsewhere;

Now therefore, in consideration of the foregoing and in consideration of the mutual promises and agreements hereinafter set out, the said parties do hereby mutually contract and agree as follows:

First. The Public Service Company hereby contracts and agrees to sell the Silk Mill for a period of one (1) year from and after November 1st, 1918, all such power in the form of electric current that may be required by the Silk Mill to handle the overload now in their present plant; more particularly to drive A. C. motors, operating looms (present estimate for horse power for weaving is seventy five horse power), situated at the Silk Mill works, High Point, N. C., which lies along East Greene Street, High Point, N. C., said electric current to be delivered to the Silk Mill at the aforesaid point and more particularly located at the points on the outside walls of the buildings of the Silk Mill where the wires of the Public Service Company shall connect the wires of the Silk Mill, which said point shall be hereinafter known as the "Delivery Point," and the silk Mill hereby agrees to purchase and receive from the Public Service Company, at the location and at said delivery point, and at primary voltage sufficient power for use by the Silk Mill for power purposes and for driving all weave motors which may be installed in said Silk Mill works, at the following rate:

						Gross.	Net.		
1 to 5,000 K. W. H. per Mo.						2.105	2c.	per K. W. H.	
5,001	"	7,500	"	"	"	2.0	1.9	"	"
7,501	"	10,000	"	"	"	1.899	1.8	"	"
10,001	"	20,000	"	"	"	1.843	1.75	"	"
20,001	"	50,000	"	"	"	1.685	1.6	"	"
50,000	and over		"	"	"	1.58	1.5	"	"

which said rate the Silk Mill agrees to pay for all current consumed at primary voltage. A cash discount of five (5%) per cent will be allowed provided that the monthly bill for service furnished hereunder is paid at the office of the Company on or before noon of the 10th day after this date. It being understood and agreed, however, that the Silk Mill shall pay a minimum bill of fifty (50c.) cents per month per horse power or connected load, in the event of current consumed at the above rate shall not amount to the said sum. Said minimum charge to be made in consideration of

310 the advantageous rate herein contracted for and to be enjoyed by the party of the second part and agreed to by the party of the first part, and to reimburse the party of the first part for the installation of equipment, etc., being a "Readiness to Serve" charge. It is understood and agreed, however, that nothing herein contained shall be construed so as to require the Silk Mill to pay as a minimum charge, a sum greater than the current actually consumed at the rate herein named amounts to, when such failure to consume the current is the result of inability of the Public Service Company, thru no fault of the Silk Mill to supply such current.

Second. The Public Service Company agrees to deliver said power to be used for driving motors with alternating current, on what is known as three phase distribution of approximately 60 cycles periodicity, and on approximately 220 volt for all motors installed and in operation as of the date first above written, or 2,200 volts where the Silk Mill installs additional motors of a capacity of twenty horse power and over, (such as for operating motor generator, etc.) It being distinctly understood and agreed that the service furnished shall be at a voltage suitable for operating the present motor installation; and further that after said Silk Mill has made its selection of the voltage of the various systems hereinbefore mentioned they shall not have the privilege of changing the said voltage without the consent of the Public Service Company first obtained in writing. The Silk Mill further agrees to notify the Public Service Company at any time of its intention to add additional connected load in motors.

Third. And the said Public Service Company further agrees that it will install all such necessary transformers as may be required to deliver the current at a pressure commercially known as 220 volts as mentioned in paragraph second hereof. The said Public Service Company will furnish, install and maintain in good condition, at convenient points, commercially accurate recording watt meters such as may be necessary to register current (on primary side of transformer and to 2,200 volt motors) consumed by the Silk Mill.

311 Fourth. And the said Silk Mill hereby further agrees to furnish all such repairs as may be necessary to its power distribution system. It being understood by this agreement that when the Public Service Company shall have delivered to the Silk Mill energy in the form of electric current of the pressure represented by the voltage hereinbefore set out in paragraph- second and third hereof, it has complied with the terms of this contract.

Fifth. As it is hereby mutually agreed by and between the parties hereto, that neither party hereto shall be responsible for accident or injury or damage to the machinery, apparatus, appliances, or other property of the other caused by lightning, defects in, or failure of the machinery, apparatus or appliances of the other; and it is expressly understood and agreed that the said Public Service Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for, and payable on basis of current supplied at 2,200 volts, three phase, 60 cycle to 2,200 volt motors or to transformers supplying the aforesaid low voltage service for motors, and that said Public Service Company shall not be in any way responsible for the transmission or control of said electric power current beyond such points of its delivery to said Silk Mill, and it shall not in any event be liable for damages or injury to any person or property, whatsoever, arising, accruing, or resulting in any manner the receiving, use, consumption, application or distribution by said Silk Mill of said electric power, except such as may result from the negligence of said Public Service Company, and said Silk Mill shall except as aforesaid, hold and save harmless the Public Service Company from any and all liability or liabilities to any person, or corpo-

ration incurred or sustained by said Public Service Company by reason thereof or of any negligence or misconduct on the part of the Silk Mill, their officers, agents, servants, or employees:

Sixth. And the said Public Service Company shall provide regular and uninterrupted power service and said Silk Mill will regularly and continuously receive, use and apply same; but in case the
312 service of the said Public Service Company shall be interrupted, suspended, or shall fail, or in any case said Silk Mill shall be prevented from receiving, using and applying said electric power, as to either party by reason of or through strike, stoppage of labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurp power, accident, order of any Court or Judge granted in any bona fide adverse legal proceedings or of any cause reasonably beyond the control of either party and not attributable to its neglect, then and in such event said Public Service Company shall not be obligated to deliver such electric power hereinunder during such period, and it shall not be liable for any damage or loss resulting from such interruption, prevention, suspension, or failure, and said Silk Mill shall not be obligated to receive or pay for power during such period; and in any and all such event or events, the party suffering such interruption, prevention, suspension, or failure, shall be prompt and diligent in removing and overcoming such cause or causes thereof; provided, however, that either party whose plant shall suspend operation by reason of accident to its machinery, plant or system shall proceed at once to repair same within a reasonable time, the failure to do so, the limit of or exemption from liability as fixed in this paragraph shall not apply, and the party shall be liable to the other as though no such limit or exception had been fixed.

Seventh. And it is hereby mutually agreed by and between the parties hereto that this contract shall take effect as of the day when executed, and shall inure to the benefit of and be binding upon the parties hereto and their respective successors, and assigns, and shall continue for a period of one (1) year from and after said date and thereafter for ninety days in the event the Silk Mill desiring to dispense with the service hereinunder contracted for, elects to continue to purchase power for said ninety days (this provision is made in order to provide for service during the installation of equipment, etc., that would have to be installed to supply and replace service contracted for hereinunder), providing, however, that in the event of the Silk Mill desiring to continue to purchase power after the expiration of the one year period as herein stipulated, that the Silk Mill
will make such purchase from the Public Service Company
313 thru the renewal of the one year proposition herein contained, and the same terms and conditions set forth will be a part and body of the renewal agreement and will continue for a period of five years after the expiration of said one year agreement, and thereafter until either party hereto shall have served upon the other party ninety (90) days' written notice of its intention to terminate its agreement. The Public Service Company further agrees to deliver

current and the Silk Mill agrees to accept same under this agreement not later than ninety days (90) from the execution hereof.

Eighth. It is distinctly agreed and understood that the power herein contracted for shall not be resold, either directly or indirectly by the Silk Mill without the written consent of the Public Service Company first obtained.

In witness whereof, the parties hereto have caused this contract to be executed in duplicate and their respective names by their respective duly authorized officers, the day and year first above fixed. North Carolina Public Service Company, by Chas. B. Hole, Pt. In the presence of E. C. Deal V. P. Stehli Silk Corporation, by E. J. Stehli, Pres. In the presence of C. W. Barlow, Secy.

"Defendant's Exhibit 24."

Contract Between N. C. Public Service Co. and Durham Hosiery Mills #3, Inc., Dated April 1, 1917.

NORTH CAROLINA,
Guilford County:

This contract and agreement made and entered into this 314 the 1st day of April A. D., 1917, by and between North Carolina Public Service Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, party of the first part, and hereinafter designated "Public Service Company," and the Durham Hosiery Mills #3 Inc., a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, and hereinafter designated "The Hosiery Mills," party of the second part, Witnesseth:

That whereas, the said party of the first part is engaged in the manufacture, sale and distribution of power in the form of electric current for power purposes in the City of High Point and elsewhere:

And whereas, the Hosiery Mills is desirous of obtaining power in the form of electric current delivered in the manner hereinafter set out for the purpose of driving its motors for mechanical and other purposes:

Now therefore, in consideration of the foregoing and in consideration of the mutual promises and agreements hereinafter set out, the said parties do hereby mutually contract and agree as follows:

1.

The Public Service Company hereby contracts and agrees to sell the Hosiery Mills for a period of five (5) years from and after April 1st, 1917, all such power in the form of electric current as may be required by the Hosiery Mills for the purpose of operating the motors situated at the Durham Hosiery Mills #3 on Hamilton Street, High Point, N. C., said current to be delivered to the Hosiery Mills at the aforesaid points and more particularly located at the point on the outside wall of the mill buildings of the Hosiery Mill,

where the wires of the Public Service Company shall connect the wires of the Hosiery Mill, which said point shall be hereinafter known as the "delivery point," and the Hosiery Mill hereby agrees to purchase and receive from the Public Service Company, at 315 said location and at said delivery point, sufficient power for use by the Hosiery Mills for driving all motors which may be installed in said Hosiery Mill at the following rate:

6c. per K. W. H. for the first	300 KWH per month.
4.5c. " " " " " " next	300 " " "
2.5c. " " " " " " "	900 " " "
2.0c. " " " " " " "	1,000 " " "
1.5c. " " " " " " all over	2,500 " " "

Discount of 5% if bill is paid within ten (10) days from date bill is rendered, which said rates the Hosiery Mill agrees to pay monthly for all current consumed and supplied. Payments shall be made by the Hosiery Mill to the Public Service Company promptly upon bills rendered the first of each month for all current consumed during the preceding month. It being agreed and understood, however, that the Hosiery Mill shall pay a minimum bill based on connected capacity in horse power or its equivalent, of

\$1.00 Net per month per H. P. for first 10	H. P.
\$.75 " " " " " " next 20	" "
\$.50 " " " " " " all over 30	" "

in the event of current consumed at the above rate shall not amount to the said sum. Said minimum charge to be made in consideration of the advantageous rate herein contracted for and to be enjoyed by the party of the second part and agreed to by the party of the first part, and to reimburse the party of the first part for transformer losses, installation of equipment, etc., being a "Readiness to Serve" charge. It is understood and agreed, however, that nothing herein contained shall be construed so as to require the Hosiery Mill to pay as a minimum charge, a sum greater than the current actually consumed at the rate herein named amounts to, when such failure to so consume the current is the result of the inability of the Public Service Company, thru no fault of the Hosiery Mill, to supply such current.

2.

The Public Service Company agrees to deliver such power to be three phase distribution of approximately 60 cycles periodicity, and on approximately 220 volts for all motors of 2,200 volts where the Hosiery Mill desires to operate 2,200 bolts motors. It being 316 distinctly understood and agreed that the service furnished shall be at a voltage suitable for operating the present motor installation, and further that after the said Hosiery Mill has made their selection of the voltage of the various systems hereinbefore

mentioned, it shall not have the privilege of changing said voltage without the consent of the Public Service Company first obtained in writing (the present equipment of the Hosiery Mill requires the voltage hereinbefore mentioned).

3.

And the said Public Service Company further agrees that it will install all such necessary transformers as may be required to deliver the current at a pressure commercially known as 220 volts as mentioned in paragraph second hereof. The said Public Service Company will furnish, install and maintain in good condition, at convenient points, commercially accurate recording watt meters such as may be necessary to register current consumed by the Hosiery Mill. The said meter to be installed at a point being mutually agreed upon and a separate meter to be supplied for the 220 volt motors and the 220 volt motor service.

4.

And the said Hosiery Mill hereby further agrees to furnish such renewals as may be required, and such repairs as may be necessary to its power distribution system. It being understood by this agreement that when the Public Service Company shall have delivered to the Hosiery Mill energy in the form of electric current of the pressure represented by the voltage hereinbefore set out in paragraph second and third hereof, it has complied with the terms of the contract.

5.

And it is hereby mutually agreed by and between the parties hereto, that neither party hereto shall be responsible for accident or for injury or damage to the machinery, apparatus, appliances or other property of the one caused by lightning, defects in, or failure of the machinery, apparatus or appliances, of the other, and it is expressly understood and agreed that the said Public Service Company is merely a furnisher of electric current deliverable at

317 the delivery point hereinbefore provided for, and that said Public Service Company shall not be in any way responsible for the transmission or control of said electric power current beyond such points of its delivery to said Hosiery Mill, and it shall not in any event be liable for damages or injury to any person or property, whatsoever, arising accruing or resulting from in any manner, the receiving, use, consumption, application or distribution by said Hosiery Mill of said electric power, except such as may result from the negligence of said Public Service Company, and the Hosiery Mill shall except as aforesaid, hold and save harmless the Public Service Company from any and all liability or liabilities to any person or corporation incurred or sustained by said Public Service Company by reason thereof or of any negligence or misconduct on

the part of the Hosiery Mill, its officers, agents, servants or employees:

6.

And the said Public Service Company shall provide regular and uninterrupted power service, and said Hosiery Mill will regularly and continuously receive, use and apply the same; but in case the service of the said Public Service Company shall be interrupted, suspended, or shall fail, or in any case said Hosiery Mill shall be prevented from receiving, using and applying said electric power, as to either party by reason of or thru strike, stoppage of labor, riot, fire, flood, ice, invasion, Civil War, commotion, insurrection, military or usurp power, accident, order of the Court of Judge granted in any bona fide adverse legal proceedings or action of any civil authority, explosion, act of God or of the Public Enemy, or of any cause reasonably beyond the control of either party and not attributable to its neglect, then and in such event said Public Service Company shall not be obligated to deliver said electric power hereunder during such period, and it shall not be liable for any damage or loss resulting from such interruption, prevention, suspension, or failure, and said Hosiery Mill shall not be obligated to receive or pay for power during such period; and in any and all such event or events, the party suffering such interruption, prevention, suspension, or failure, shall be prompt and diligent in removing and overcoming such cause or causes thereof, provided however, that either party whose plant shall suspend operation by reason of accident to its machinery, plant or system shall proceed at once to repair the same within a reasonable time, the failure to do so, the limit of or exemption from liability as fixed in this paragraph shall not apply, and the party shall be liable to the other as tho no such limit or exemption had been fixed:

7.

And it is hereby mutually agreed by and between the parties hereto that this contract shall take effect as of the date when executed, and shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, and shall continue for a period of five (5) years from and after said date and thereafter, until either party hereto shall have served upon the other party ninety (90) days written notice of its intention to terminate this agreement:

8.

It is definitely agreed and understood that the power herein contracted for shall not be resold, either directly or indirectly by the Hosiery Mill without the written consent of the said Public Service Company first obtained.

In witness whereof, the parties hereto have caused this contract to be executed in duplicate and their respective names by their respect-

ive duly authorized officers, the day and the year first above fixed. North Carolina Public Service Company, by R. J. Hole, G. M. In the presence of C. H. Andrews. Durham Hosiery Mills #3, Inc., by W. F. Carr, Sec. & Asst. Treas. In the presence of J. H. Jennings.

319

"Defendant's Exhibit 25."

Contract Between N. C. Public Service Co. and Armour Fertilizer Works, Dated Dec. 1, 1917.

NORTH CAROLINA,
Guilford County:

This contract and agreement made and entered into this the 1st day of December A. D. 1917, by and between the North Carolina Public Service Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, party of the first part, and hereinafter called the "Public Service Company," and the Armour Fertilizer Works, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and hereinafter designated the "Fertilizer Company," party of the second part witnesseth:

That whereas, the said party of the first part is engaged in the manufacture, sale and distribution of power in the form of electric current for lighting and power purposes in the City of Greensboro and elsewhere: and

Whereas, the Fertilizer Company is desirous of obtaining power in the form of electric current delivered in the manner hereinafter set out for the purposes of lighting its works, offices, buildings and grounds and driving its motors for mechanical and other purposes:

Now therefore, in consideration of the foregoing and in consideration of the mutual promises and agreement hereinafter set out, the said parties do hereby mutually contract and agree as follows:

First. The Public Service Company hereby agrees to sell and deliver to the Fertilizer Company during the life of this contract as hereinafter limited, at the Fertilizer Company's works, which lie along the Southern Railway, Sanford-Mount Airy Line at Buffalo Creek, near the City of Greensboro, County of Guilford, State of

North Carolina, and more particularly located at the points

320 on the outside walls of the buildings of the plant of said Fertilizer Company, where the wires of the said Public Service

Company shall connect the wires of the said Fertilizer Company, which said point shall be hereinafter known as the delivery point, and the Fertilizer Company hereby agrees to purchase and receive from the Public Service Company, at said works, and at said delivery points, sufficient power in the form of electric current for use by the Fertilizer Company for lighting its works, buildings and grounds and for driving all motors which may be installed in said works, at the following rates:

1 to	500 K. W. H. per mo.	6c.	per K. W. H.
501 "	1,000 " " "	4½c.	" "
1,001 "	5,000 " " "	3½c.	" "
5,001 "	10,000 " " "	3c.	" "
10,001 "	15,000 " " "	2½c.	" "
15,001 and over	" " "	2.2;	" "

It being understood and agreed that the Fertilizer Company shall pay a minimum bill of one Hundred (\$100.00) dollars per month in the event the current consumed at the above rate shall not amount to said sum. Such minimum charge to reimburse the Public Service Company for transformer losses, installation of equipment, etc., being a "Readiness to Serve" charge. Payments shall be made by the Fertilizer Company promptly upon bills rendered the first of each month for all current consumed during the preceding month. It is understood and agreed, however, that nothing herein contained shall be construed so as to require the Fertilizer Company to pay as a minimum charge, a sum greater than the current actually consumed at the rate herein named amounts to, when such failure to so consume the current is the result of the inability of the Public Service Company thru no fault of the Fertilizer Company to supply such current.

Second. The Public Service Company agrees to deliver such power for lighting on what is known as the single phase distribution at approximately 60 cycles periodicity of alternating current at an approximate voltage of 110 volts or at approximately 2200 volts if the Fertilizer Company desires to operate a series arc lighting system from the Public Service Company's lines, and to deliver said power
321 to be used for driving motors as alternating current, on what is known as a three-phase distribution of approximately 60 cycles periodicity and at approximately 440 volts for all motors or 2200 volts where the Fertilizer Company desires to operate 2200 volt meters. It being distinctly understood and agreed that after said Fertilizer Company has made its selection as to the voltage of the various systems hereinbefore mentioned it shall not have the privilege of changing said voltage without the consent of the Public Service Company first obtained in writing.

Third. And the said Public Service Company further agrees that it will install all such necessary transformers as may be required to deliver the current at a pressure of 110 volts or 440 volts as mentioned in paragraph second hereof, and that the current so delivered shall not vary in frequency more than 2 cycles above or below sixty cycles for any period of thirty consecutive seconds excepting in cases of accidents or emergencies as hereinafter mentioned, and the voltage furnished to said Fertilizer Company shall not normally vary more than 10% above or below the normal voltage of 110 or 440 volts for a period of thirty consecutive minutes, provided, however, that this clause shall not apply when the motor used for operating the fire pump of said Fertilizer Company, is in operation. The said Public Service Company will furnish, install and maintain in good condition, at convenient points, commercially accurate recording watt

meters such as may be necessary to register the current consumed by the Fertilizer Company. The said meters to be installed at a point to be mutually agreed upon and a separate meter to be supplied for the 2200 volt motors, the 110 lighting and 440 volt motor service. Said meters for measuring the 110 and 440 volt service shall be installed on the secondary side of the transformers.

Fourth. And the said Fertilizer Company hereby further agrees to furnish all incandescent lamps required by it, together with such renewals as may be required, to furnish carbons and labor for trimming its arc lamps and such other repairs as may be necessary to its lighting and power distribution system. It being understood
322 by this agreement that when the Public Service Company shall have delivered to the Fertilizer Company energy in the form of electric current of the pressure represented by the voltage hereinbefore set out in paragraphs second and third hereof it has complied with the terms of this contract.

Fifth. And it is hereby mutually agreed by and between the parties hereto that neither party hereto shall be responsible for accident or for injury or damage to the machinery, apparatus, appliances, or other property of the one caused by lightning, defects in, or a failure of the machinery, apparatus or appliances of the other; and it is expressly understood and agreed that said Public Service Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for and that said Public Service Company shall not be in any way responsible for the transmission or control of said electric power current beyond such a point of its delivery to said Fertilizer Company, and shall not, in any event, be liable for damages, or injury to any person or property whatsoever, arising, accruing or resulting from, in any manner, the receiving, use, consumption, application or distribution by said Fertilizer Company of said electric power except such as may result from the negligence of said Public Service Company and said Fertilizer Company shall except as aforesaid hold and save harmless the Public Service Company from any and all liability or liabilities to any person or corporation incurred or sustained by said Public Service Company by reason thereof or of any negligence or misconduct on the part of the Fertilizer Company, its officers, agents, servants, or employees.

Sixth. And the said Public Service Company shall provide regular and uninterrupted power service, and said Fertilizer Company will regularly and continuously, receive, use and apply the same; but in case the service of the said Public Service Company shall be interrupted, suspended or shall fail, or in case said Fertilizer Company shall be prevented from receiving, using and applying said electric power, as to either party by reason of or thru strike, stoppage of
323 labor, riot, fire, flood, etc., ice, invasion, civil war, commotion, insurrection, military or usurp power, accident, order of any court or judge granted in any bona fide adverse legal proceedings or action, or any civil authority, explosion, act of God or of the public enemies, or any cause reasonable beyond the control of either party and not attributable to its neglect, then and in such event said Public Service Company shall not be obligated to deliver said electric

power hereunder during such period, and shall not be liable for any damage or loss resulting from such interruption, prevention, suspension or failure, and said Fertilizer Company shall not be obligated to receive or pay for power during such period; and in any and all such event or events, the party suffering such interruption, prevention, suspension, or failure shall be prompt and diligent in removing and overcoming such cause or causes thereof; provided, however, that either party whose plant shall suspend operation by reason of accident to its machinery, plant or system, shall proceed at once to repair the same within a reasonable time, and failing to do so, the limit of or exemption from liability as fixed in this paragraph shall not apply and the party shall be liable to the other as tho no such limit or exemption has been fixed.

Addition to Clause Six.

It is further understood and agreed that in case for any reason the Fertilizer Company discontinues the operation of this said plant, or the same is destroyed by fire or casualty, the said Fertilizer Company shall have the privilege to cancel this contract by giving the Public Service Company written notice of its intention so to do thirty days prior to said cancellation. Provided, however, that in case it exercises its option to so cancel the said contract, it agrees then to pay the said Public Service Company as agreed liquidated damages \$17.50 for each unexpired month then remaining until the expiration of the fifth year from the date of the execution of this contract.

Seventh. And it is hereby mutually agreed by and between the parties hereto that this contract shall take effect as of the
324 date when executed, and shall enure to the benefit of and be binding upon the parties hereto and their respective successors, and assigns, and shall continue for a period of five (5) years from and after said date and thereafter, until either party hereto shall have served upon the other party ninety days' written notice of its intention to terminate this agreement.

Eighth. It is distinctly agreed and understood that the power herein contracted for shall not be resold either directly or indirectly by said Fertilizer Company without the written consent of the said Public Service Company first obtained in writing.

Ninth. The rates above set forth are predicated upon the rates being paid by the North Carolina Public Service Company to the Southern Power Company for current under an agreement between the said companies dated December 23rd, 1908, and expiring March, 1920:

It is therefore agreed between the North Carolina Public Service Company and the Armour Fertilizer Works that if the said agreement with the Southern Power Company is renewed at a rate higher or lower than 1.1 cents per kilowatt hour for the current thus purchased by the Public Service Company, then the Fertilizer Company agrees to pay the Public Service Company a sum above or below the schedule rates by the amount of $1\frac{1}{4}$ mills per kilowatt

hour of energy consumed for every one mill per K. W. H. or fraction thereof, increase or decrease respectively; or if the said agreement is not renewed and the Public Service Company shall deliver to the Fertilizer Company current generated from coal, then the price for each kilowatt hour of electric current supplied under this contract shall be subject each month to an additional or a deduction of one fifth of a mill per kilowatt hour for each ten cents or fraction thereof increase or decrease respectively from the normal price for bituminous coal of \$3.65 per short ton. To the North Carolina Public Service Company F. O. B. cars at its generating stations, during the month.

In witness whereof the parties hereto have caused this contract to be executed in duplicate and in their respective names by
 325 their respective duly authorized officers, the day and year first above written. North Carolina Public Service Company, by Chas. B. Hole, Pt. In presence of C. H. Andrews, as to N. C. Public Service Co. Armour Fertilizer Works, by Dewitt Brown, 1st Vice Pres. In presence of J. E. Maddox, as to Armour Fertilizer Works.

"Defendant's Exhibit 26."

Contract Between N. C. Public Service Co. and Swift & Co., Dated July 30, 1917.

NORTH CAROLINA,
 Guilford County:

This contract and agreement made and entered into this the 30th day of July A. D. 1917, by and between the North Carolina Public Service Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, party of the first part, and hereinafter called the "Public Service Company," and the Swift and Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and hereinafter designated the "Fertilizer Company," party of the second part: Witnesseth:

That whereas, the said party of the first part is engaged in the manufacture, sale and distribution of power in the form of electric current for lighting and power purposes in the city of Greensboro and elsewhere: and

Whereas, the Fertilizer Company is desirous of obtaining power in the form of electric current delivered in the manner hereinafter set out for the purposes of lighting its works, offices, buildings and grounds and driving its motors for mechanical and other purposes:

Now therefore, in consideration of the foregoing and in consideration of the mutual promises and agreement hereinafter set out, the said parties do mutually agree as follows:

First. The Public Service Company hereby agrees to sell and deliver to the Fertilizer Company during the life of this contract as

hereinafter limited, at the Fertilizer's works, which lie along the Southern Railway, Sanford-Mount Airy Line at Mile Run Creek, near the City of Greensboro, County of Guilford, State of North Carolina, and more particularly located at the points on the outside walls of the buildings of the plant of said Fertilizer Company, where the wires of the said Public Service Company shall connect the wires of the said Fertilizer Company, which said point shall be hereinafter known as the delivery point, and the Fertilizer Company hereby agrees to purchase and receive from the Public Service Company, at said works, and at said delivery points, sufficient power in the form of electric current for use by the Fertilizer Company for lighting its works, buildings, and grounds and for driving all motors which may be installed in said works, at the following rates:

	1 to	500 K. W. H. per Mo.	6c. per K. W. H.
501	" 1,000	" " " " " " " " " " " "	4½c. " " "
1,001	" 5,000	" " " " " " " " " " " "	3½c. " " "
5,001	" 10,000	" " " " " " " " " " " "	3c. " " "
10,001	" 15,000	" " " " " " " " " " " "	2½c. " " "
15,001	and over	" " " " " " " " " " " "	2.2c. " " "

which said rates the Fertilizer Company agrees to pay monthly for all current consumed and supplied at its plant. It is understood, however, that should the Fertilizer Company desire to purchase power at primary voltage, and will furnish necessary stepdown transformers, then and in such even-, in consideration of the Fertilizer Company furnishing said transformers and of the metering of the power on the primary side of the transformers, the

327 aforesaid rates will be reduced five (5) per cent. It being understood and agreed that the Fertilizer Company shall have an initial connected load of approximately 35 horse power, and shall pay a minimum of fifty (50c.) cents per month per horse power of connected load, in the event of current consumed at the above rate shall not amount to said sum. Such minimum basis of charging to continue in the event of additional installation of motors up to a connected load aggregating 200 horse power, and in the event of further increase in connected load the minimum charge will not increase beyond one hundred (\$100.00) dollars per month. Such minimum charge to reimburse the Public Service Company for transformer losses, installation of equipment, etc., being a "Readiness to Serve" charge. Payments shall be made by the Fertilizer Company to the Public Service Company promptly upon bills rendered the first of each month for all current consumed during the preceding month. It is understood and agreed, however, that nothing herein contained shall be construed so as to require the Fertilizer Company to pay as a minimum charge, a sum greater than the current actually consumed at the rate herein named amounts to when such failure to so consume the current is the result of the inability of the Public Service Company through no fault of the Fertilizer Company to supply such current.

Second. The Public Service Company agrees to deliver such power for lighting and for driving motors as alternating current, on what is known as a three phase distribution of approximately 60 cycles periodicity and at approximately 440 volts. It being distinctly understood and agreed that after said Fertilizer Company has made its selection as to the voltage of the systems hereinbefore mentioned, it shall not have the privilege of changing said voltage without the consent of the Public Service Company first obtained in writing. In the event of the Fertilizer Company desiring other voltages such as would be required for a 2,300 volt, three phase, 60 cycles pump service, etc., it shall not be the duty of the Public Service Company to supply such special service, but it is expressly understood and agreed that the Fertilizer Company shall furnish necessary
328 transformers, apparatus, etc., for the stepping up, changing or otherwise correcting the voltage of the system adopted and mentioned hereinbefore. The delivery, sale and metering of such special service to be made at the delivery point hereinbefore mentioned.

Third. And the Public Service Company further agrees that it will install all such necessary transformers as may be required to deliver the current at a commercial operating voltage, voltage under normal conditions not to be lower than 440, and that abnormal conditions, when voltage lower than this might be expected, or unreasonably high voltage will not occur so often or be of such duration as to materially interfere with the normal operation of the Fertilizer Plant. The said Public Service Company will furnish, install and maintain in good condition at the delivery point commercially accurate recording watt meters, such as may be necessary to register the current consumed by the Fertilizer Company.

Fourth. And the said Fertilizer Company hereby further agrees to furnish all incandescent lamps required by it, together with such renewals as may be required, to furnish carbons and labor for trimming its arc lamps and such other repairs as may be necessary to its lighting and power distribution system. It being understood by this agreement that when the Public Service Company shall have delivered to the Fertilizer Company energy in the form of electric current of the pressure represented by the voltage hereinbefore set out in paragraphs second and third hereof it has complied with the terms of this contract.

Fifth. And it is hereby mutually agreed by and between the parties hereto that neither party hereto shall be responsible for accident or for injury or damage to the machinery, apparatus, appliances, or other property of the one caused by lighting, defects in, or a failure of the machinery, apparatus or appliances of the other; and it is expressly understood and agreed that said Public Service Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for and that the said
329 Public Service Company shall not be in any way responsible for the transmission or control of said electric power current beyond such point of its delivery to said Fertilizer Company, and shall not, in any event, be liable for damages, or injury to any per-

son or property whatsoever, arising, accruing or resulting from, in any manner, the receiving, use, consumption, application or distribution by said Fertilizer Company of said electric power except such as may result from the negligence of said Public Service Company, and said Fertilizer Company shall except as aforesaid, hold and save harmless the Public Service Company from any and all liability or liabilities to any person or corporation incurred or sustained by said Public Service Company by reason thereof or of any negligence or misconduct on the part of the Fertilizer Company, its officers, agents, servants or employees.

Sixth. And it is hereby mutually agreed by and between the parties hereto that this contract shall take effect as of the date when executed, and shall enure to the benefit of and be binding upon the parties hereto and their respective successors, and assigns, and shall continue for a period of five (5) years from and after said date, and thereafter until either party hereto shall have served upon the other party, ninety (90) days' written notice of its intention to terminate this agreement.

The Public Service Company further agrees to deliver current and the Fertilizer Company agrees to accept same under this agreement not later than ninety (90) days from the execution hereof.

Eighth. It is distinctly agreed and understood that the power herein contracted for shall not be resold either directly or indirectly by said Fertilizer Company without the written consent of the said Public Service Company first obtained in writing.

Ninth. In case the rate for the class of service covered by this contract is reduced, the Fertilizer Company shall have the benefit of such reduction.

In witness whereof the parties hereto have caused this contract to be executed in duplicate in their respective names by their
330 respective duly authorized officers, the day and year first above
written. North Carolina Public Service Company, by Chas.
B. Hole, Pres. In presence of C. H. Andrews. Swift & Company,
by W. A. Burnet.

"Defendant's Exhibit 27."

Ordinance Granting Permission to John Karr and W. D. Barr Right, &c., to Operate and Maintain a Street Railway in City of Greensboro.

At a regular meeting of the Board of Aldermen of the City of Greensboro held on May 24, 1901, at which were present the following aldermen, to wit, Bain, Denny, Elam, Glascock, Helms, Joyner, Lewis, Phipps and Sherwood, the following ordinance was offered by Mr. Glascock, to wit:

Be it ordained by the board of aldermen of the city of Greensboro:

First. That John Karr and W. D. Barr, their successors, assigns, associates, or such corporation as they may organize, are hereby granted the right privilege and franchise to locate, lay, construct, op-

erate and maintain a street railway within the limits of the City of Greensboro, North Carolina, for the carrying of passengers and freight by, over and along any and all the streets and avenues of said City by means of electric, or other, power, except horse or steam power, and for this purpose may lay out and put in all necessary siding and terminals and erect poles for trolley and feed wires along the sidewalks of said streets and avenues and erect all other appliances necessary and proper to string their wires upon said poles.

331 Second. That the privilege herein granted is for a single track railway.

Third. That the rights, privileges and franchises hereby granted shall continue for thirty (30) years from and after the date of the completion of said railway.

Fourth. That upon the expiration of the period for which the aforesaid rights, privileges and franchises are granted, unless it is otherwise agreed upon by the Board of Aldermen by the City of Greensboro, the said John Karr and W. D. Barr, or their successors, assigns, associates or such corporation as they may organize, at their own cost and expense, shall, within six (6) months after notice in writing so to do, remove from the aforesaid streets, avenues and sidewalks all tracks, wires, trolleys, poles, appliances or appurtenances of said company and make good and repair all damages and injury done said streets, avenues and sidewalks by said removal; provided further, that if said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize shall fail for ninety (90) days to give the service hereinafter required, unless prevented by providential hindrance or unavoidable accident or strike, then in that event the City may by resolution declare this said franchise forfeited and require said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize, to at once remove at their own expense all of its said tracks, poles and other appliances and property from the streets, avenues and public places in the City, and, in case the said John Karr and W. D. Barr, their successors and assigns, associates or such corporation as they may organize, fail to remove said property as required, then the City may remove it and the expense of removal shall be a lien on the property so removed.

Fifth. That the privileges, rights and franchises herein granted are granted upon the condition and with the limitations and restrictions herein following.

332 Sixth. That the said railway and appurtenances thereto shall be constructed according to the most approved method and under the general supervision of the City engineer and the Street Committee of said City, according to the plans and specifications approved by them.

Seventh. Said railway shall be located in such part of the streets and avenues over which it may pass as may be designated by the Street Committee and City Engineer, and shall be so laid down as to conform to the grade of streets through which it passes and should such grades be altered, the railway shall be correspondingly altered at the expense of the said John Karr and W. D. Barr, their successors,

assigns, associates or such corporation as they may organize, so as to conform thereto.

Eighth. That in the construction of said railway and afterwards in the maintenance thereof, the said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize shall not interfere with or injure any sewer, gas pipe, water main, plug or other apparatus or machinery connected therewith, or any property belonging to the City or its citizens.

Ninth. That as the work of constructing the said railway is completed the said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize, shall restore all pavements and grade of streets taken up and disturbed in said work, and under the supervision of the City Engineer they shall at all times, and at their own expense and charge keep so much of the streets open while the said railway is located as lies between the rails and within one (1) foot of the outside of said rails in good order and repair, and upon the failure of the said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize, so to repair, regrade and keep in repair for thirty (30) days after being required so to do by the City Engineer or the Street Committee of the said City, the said City may cause the work to be done at the expense of the said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize, and the expense thereof may be recovered of them and shall be a lien upon the said railway property.

Tenth. That the said John Karr and W. D. Barr, their successors, assigns, associates and such corporation as they may organize, shall equip the said railway line with modern cars, provided with suitable brakes to insure safe operation and shall run the cars on a regular schedule, so as to render a fair, reasonable and adequate service to the public, and shall at all times keep the tracks in proper and safe condition, unless prevented by providential interference or unavoidable circumstances. In case of failure to render the service aforesaid or to keep its tracks and cars in proper and safe condition, then, after thirty (30) days' notice in writing to said company by the City Engineer, if such dereliction continues, each day that it continues shall be a separate offence and the said company shall be subject to the fine of Twenty Dollars (\$20) for each offence to be imposed by the Mayor of said City.

Eleventh. That the price of transporting passengers to any point on the railway to be built under this franchise to any other point on same, within the City Limits, shall not exceed five cents (5c.) for each passenger, and six (6) tickets shall be sold together for not more than twenty-five cents (25c.); but, if the passenger, without leaving the car, shall return to any point nearer to that from which he started than the point which he passed, he shall pay a second fare, unless this be caused by the line of the route over which he is passing being circuitous; and the said company shall place on sale for the accommodation of children, not more than twelve (12) years of age, going to and from the public schools during the usual school year in the City, tickets in books of ten (10) to be sold at

twenty-five cents (25c.) per book, to be used only between the hours of 7.100 a. m. and 4.30 p. m. from Monday until Friday inclusive; and there shall further be placed on sale, subject to the same restrictions above enumerated, for the use of the pupils more than twelve (12) years of age who are attending the City public schools, tickets in books of eight (8) tickets, which said books shall be sold for twenty-five cents (25c.) each.

334 Twelfth. That tickets in books of eight (8) tickets shall be placed on sale at the price of twenty-five cents (25c.) for each book for the employees of the various manufacturing and commercial enterprises in and about the City, the said tickets shall be good only between the hours of 6.00 and 7.00 in the morning and between 5.30 and 7.00 in the afternoon.

Thirteenth. That tickets shall be placed on sale in books of eight (8) tickets, which said books are to be sold for twenty-five cents (25c.) each, subject to such regulations as the grantees herein may prescribe, for the use and accommodation of all students, either resident or non-resident, attending either the State Normal and Industrial College or the Greensboro Female College, which said tickets shall be good only during the school year of these institutions. That the members of the faculty of the above named colleges shall have the same privilege in the purchase of these book tickets as that accorded the students of the institutions.

Fourteenth. That the location of all switches, sidings and the terminals on railway, to be constructed hereunder shall be determined by the management of the said railway with the consent and advice of the City Engineer and the Street Committee.

Fifteenth. That all cars operated on said street railway shall come to a full stop before crossing any railway track at grade within said City Limits, and it shall be the duty of the conductor to alight from his car and precede it on foot across said tracks, and the motorman shall not proceed to cross said railway with his car until after he has received the signal from his conductor to "Come ahead." Any violation of this provision shall be deemed a misdemeanor and shall subject both the motorman and the conductor to a fine of Twenty Dollars (\$20) each for each offence, to be imposed by the Mayor of the said City.

Sixteenth. That the said John Karr and W. D. Barr, upon making the application to the Board of Aldermen for this franchise, shall be required to deposit with the Treasurer of the City of Greensboro a certified check upon some banking house in good standing, within said City, payable to the order of the Treasurer of the City of Greensboro a *certified check upon some banking house in good standing, within said city, payable to the order of the Treasurer of the City of Greensboro*, in the sum of One Thousand Dollars (\$1,000), it being expressly agreed that if said franchise is granted and the said John Karr and W. D. Barr, their successors, assigns, associates, or such corporation as they may organize, shall begin the work of construction on said line, in good faith, within six (6) months and shall prosecute the said work continuously and shall complete and have in operation five (5) miles of the same within eighteen (18) months from the passage of this.

ordinance, then, and in that event, the said check is to be returned to the said John Karr and W. D. Barr, otherwise to remain the property of the said City of Greensboro, it being expressly understood that at any time the said John Karr and W. D. Barr shall elect so to do, they shall have the option of taking up said certified check and replacing the same with a bond in the same sum, which shall be given as security, by some bonding and trust company to be approved by the Board of Aldermen of the said City, which said bond shall be conditioned to the effect as that which the deposit of the certified check is intended to secure. And it is further understood that the completion and operation of the said railway on the following streets shall be a sufficient compliance to have built and in operation five (5) miles of said railway within eighteen (18) months; South Elm Street from Fayetteville Street to the Court House Square; Fayetteville Street from South Elm Street to Asheboro Street; Asheboro Street from Fayetteville Street to the corporate limits; North Elm Street from the Court House Square to Church Street; Church Street from North Elm Street to Summit Avenue; Summit Avenue from Church Street to the corporate limits; West Market Street from the Court Square to Mendenhall Street; Mendenhall Street from West Market to Spring Garden Street, and Spring Garden Street from Mendenhall Street to the corporate limits.

Sixteenth. That all the railways operated or built hereunder shall be of the standard gage of four (4) feet, eight and one-half (8½) inches.

336 Seventeenth. That the said John Karr and W. D. Barr, their successors, assigns, associates and such corporation as they may organize, shall indemnify and save harmless the said City from any and all claims for damages which may in any manner be asserted against it by any person whatever when the said claim arises out of the construction or location of their track or operation by them of their cars or any of their machinery or appliances, or out of or by reason of the grant of the right of way of any of the franchises herein contained. Nothing, however, in this section is to be construed as recognizing on the part of the City that claim or right of action in this behalf will grow out of this ordinance in behalf of any third party.

Lighting Franchise.

Eighteenth. That the right, privilege and franchise, though of course not an exclusive one, is also hereby granted to the said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize, to locate, construct, operate and maintain, in connection with the said plant, a franchise for a street car line, a plant for furnishing electric light, heat, and power, in the City of Greensboro and its vicinity, and to this end to locate, erect and maintain requisit- posts, wires and other necessary and proper appliances, in, through, along, upon and over the streets, avenues, alleys, parks and public squares of the said City for the manufacture, operation and distribution, lease and sale of electric current and compressed air for power or illumination, to persons, natural or artificial,

public or private; all posts, poles, wires, fixtures and other appliances to be erected, maintained and operated under the supervision of the Street Committee and made always safe and secure and according to the requirements of the public interest or safety.

Nineteenth. That the Mayor, police or firemen of the said City shall have the right to cut or cause to be cut any wire of the said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize, whenever in the exercise of a fair discretion the same shall appear necessary for the immediate protection of persons or property against damage by fire, without the City's having to make compensation therefor; but the said John Karr and W. D. Barr, their successors, assigns, associates, or such corporation as they may organize, shall not be liable to third persons for damages occasioned by the City's cutting the wires, and in no event shall the City be liable to customers of the said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize, for their inability to perform their contracts thereby occasioned. The City shall also have the right, without compensation, to use for the purpose of upholding the wires of the fire alarm system any of the poles which may be erected under the grant of this franchise, provided that by so doing it shall not thereby destroy the use of said poles for the purposes of the said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize.

Twentieth. That the City shall have the power to compel by ordinance or resolution the said John Karr and W. D. Barr, their successors, assigns, associates or such corporation as they may organize, to perform the duties devolved upon them by this ordinance under a penalty of a fine of Ten Dollars (\$10) for each day during which said default continues, provided that no liability under any such resolution or ordinance shall begin until the expiration of thirty (30) days after a copy thereof shall have been served upon the said John Karr and W. D. Barr, their successors, assigns, associates, or such corporation as they may organize; but the provisions of this section shall not apply where a specific penalty is provided by another section of this ordinance.

Twenty-first. This ordinance shall be in force and effect from and after its passage.

Upon the adoption of the foregoing ordinance offered by Alderman Glascock, the roll was called as follows:

338 Ayes: Bain, Denny, Elam, Glascock, Helms, Joyner, Lewis, Merrimon, Phipps, Sergeant, Sherwood.

Nos: None.

Ordinance Was Adopted.

"Defendant's Exhibit No. 28."

Petition of Southern Power Co. to Mayor and Board of Commissioners of City of Greensboro.

STATE OF NORTH CAROLINA,
County of Guilford, City of Greensboro:

To the Mayor and Board of Commissioners of the City of Greensboro, North Carolina:

The petition of the Southern Power Company respectfully represents:

I.

That your petitioner, the Southern Power Company has for some years past been selling electricity to the North Carolina Public Service Company under a special contract which expired on January 10, 1920, which said electricity the North Carolina Public Service Company has been reselling and distributing to the citizens and inhabitants of Greensboro under a franchise granted its predecessors by the authorities of said City.

II.

That several years prior to the expiration of said contract differences and disputes arose, and have since existed between said North Carolina Public Service Company and your petitioner with respect, not only to the contract aforesaid, but also with respect to other contracts between your petitioner and said North Carolina Public Service Company for the sale of electricity in the other cities and towns in which said North Carolina Public Service Company does business.

339 That the Public Service Company has circulated the report and sought to create the impression in the mind of the public that your petitioner was and is oppressing and injuring it with the purpose to drive it out of business and thereby acquire a monopoly of the electrical business in the territory in which said Public Service Company does business, and has alleged that your petitioner, with this end in view, has and is charging it for electricity at exorbitant and unreasonable rates and had discriminated against it in favor of the Southern Public Utilities Company, an allied company with your petitioner, as well as in favor of cotton mills. Your petitioner avers that the aforesaid charges are wholly untrue and unfounded, as your petitioner has at all times charged said Public Service Company for electricity sold it a fair and reasonable price and at the same rate that it has charged other like customers under substantially similar conditions. It is true that your petitioner has charged the North Carolina Public Service Company a higher rate than it has charged cotton mills, but your petitioner has made the same difference in rates to all other Public Service Companies to whom it has sold electricity, for the reason that service to a Public

Service Company engaged in reselling electricity to members of the general public is far more exacting and onerous than service to a cotton mill. The amount of electricity consumed by a cotton mill is at all times, while the mill is being operated, practically uniform and is consumed with regularity; whereas the amount of power required by a Public Service Company for redistribution for domestic and other similar uses varies very materially from time to time, and the consumption is irregular and uncertain, with the result that it is necessary for the producing company to be prepared at all times to supply the maximum amount of power that may be required, although it only receives compensation for the amount actually consumed. With respect to the assertion that your petitioner has given the Southern Public Utilities Company a more favorable rate than it has given the Public Service Company, your petitioner avers the facts to be as follows: The contract between your petitioner and the Public Service Company for the sale of electricity to be resold and distributed by the latter in Greensboro was made in 1910, and the rate was the flat rate of 1.1c. per kilowatt hour of electricity
340 irrespective of the amount consumer. The first contract made between your petitioner and the Southern Public Utilities Company was made in June 1913, and the rate fixed therein was the standard rate then in effect for that class of service, which rate was upon a sliding scale based upon the amount of electricity consumed in each of the towns and cities in which the Southern Public Utilities Company did business, the rate beginning at 9c. and running down to 1.5c. per kilowatt hour, from which it will appear that the lowest rate charged the Utilities Company was .4c. per kilowatt hour in excess of the flat rate charged the Public Service Company for all power furnished it. Subsequently on January 1, 1916, your petitioner changed its scale of rates theretofore in effect by making a further graduation so that thereafter said rates varied from 9c. to 1.1c. per kilowatt hour, according to the amount of electricity consumed, and the Southern Public Utilities Company, together with all other customers of your petitioner was given the benefit of said change in rates. The controversy over rates first arose between your petitioner and the Public Service Company in August 1917, in connection with the renewal of the contract between said companies for the sale of electricity at Salisbury, N. C. Your petitioner then offered to make a contract with the Public Service Company identical as to rates and in every other respect with the contract then in existence between your petitioner and the Southern Public Utilities Company, but the Public Service Company refused to enter into such contract. On December 5, 1917, it became necessary for your petitioner to increase its schedule of rates for all primary power 1c. per kilowatt hour, and thereafter your petitioner entered into contracts with the Southern Public Utilities Company, as well as with all other similar customers, only upon the basis of said new schedule of rates, and in further negotiation with the North Carolina Public Service Company likewise offered to enter into a contract with it upon the basis of the same schedule of rates, and in every respect the same as contracts which it entered into with the Southern Public Utilities Com-

pany and other similar customers after said change in rates. The Public Service Company again refused to enter into any contract with your petitioner for the purchase of electricity upon the basis
341 of said standard schedule of rates, and continued to complain thereof and to insinuate that your petitioner was attempting to deal unfairly with it for the purpose of driving it out of business and acquiring a monopoly of said business, and in the course of said controversy asserted to your petitioner that it could generate its own electricity either through the operation of a steam plant or by the development of a hydro-electric plant cheaper than it could purchase it from your petitioner, and went so far as to exhibit to your petitioner proposed plans for the development of a hydro-electric plant with the threat that unless your petitioner would accede to the rate demanded by said Public Service Company, it would generate its own electricity.

III.

That on account of the controversy above referred to between your petitioner and said Public Service Company, and the consequent uncertainty as to whether said Public Service Company would contract with your petitioner to continue to purchase electricity from your petitioner at the same fair and reasonable rates your petitioner was then charging others under substantially similar conditions therefor, your petitioner entered into, and now has, bona fide contracts with direct consumers for the sale of all the electricity, which it can normally generate, itself, or acquire from other generating companies, with whom it has contracts, for the purchase of electricity; your petitioner having been authorized and required by law to give said direct consumers preference over the said Public Service Company, not only for the reasons above stated, but for the further reason that said consumers, not being public service corporations, were not themselves in a position to generate the electricity needed for their own personal consumption, whereas said Public Service Company, being a Public Service Corporation clothed with like powers and duties as your petitioner, was, or should have been, in a position to generate the necessary electricity for its own consumption, and for distribution by it to its patrons, and therefore, had no right to demand that your petitioner should sell
342 it electricity, which your petitioner needed to supply the demands of its customers directly consuming the same.

That accordingly, and on account of the matters and things hereinbefore set out, your petitioner, on January 8, 1920, wrote said Public Service Company the letter, a copy of which is hereto attached, and made a part hereof, advising said Public Service Company of your petitioner's unwillingness and inability to enter new contracts with it for the sale of electricity, and of the urgent necessity of said Public Service Company putting itself in position to serve the citizens of Greensboro after January 1, 1921, without relying upon your petitioner for electricity, but at the same time

voluntarily offering to do all in your petitioner's power to supply said Public Service Company with electricity until January 1, 1921, without even charging anything for depreciation of the plant and equipment employed in rendering such service. That your petitioner made this offer to said Public Service Company, and has since complied therewith in order that said Public Service Company might have ample time within which to arrange for serving its customers in Greensboro, without injury to its business or inconvenience to the citizens of said city.

V.

That your petitioner is informed and believes that said Public Service Company has not taken, nor does it intend to take, any steps whatever towards complying with the notice contained in your petitioner's said letter, but expects to rely wholly upon its alleged right to require your petitioner to continue after January 1, 1921, to furnish it the necessary electricity for distribution among its customers in Greensboro, which your petitioner hereby respectfully notifies your Honorable Board it will refuse to do after the date above mentioned, so that unless this Honorable Board shall grant to your petitioner the franchise hereinafter asked for, the city and the citizens of Greensboro, on and after January 1, 1921, will be wholly without a dependable supply of electricity for their needs and requirements.

343

VI.

That while your petitioner denies that said Public Service Company has the right to demand or require that your petitioner shall continue to sell it the necessary electricity for distribution among its customers, yet your petitioner recognizes its obligation to furnish your city and citizens whatever electricity shall be needed for municipal and domestic consumption in preference to its customers, who only need, or use, the same for industrial purposes, provided your Honorable Board will grant it a franchise to enable it to discharge this public duty, or obligation; as it claims, and hereby asserts, the right to render such service directly to the city and citizens of Greensboro, to whom alone it is responsible, and not through the medium of the North Carolina Public Service Company, to whom it owes no public duty whatever. It, therefore, hereby applies to this Honorable Board for a franchise to construct, maintain and operate in said city, and along and over its streets, and other public places therein, the necessary transmission lines, poles, appliances, etc., to enable it to furnish and supply the city and its citizens with electricity required by them for municipal, domestic and other purposes, hereby assuring your Honorable Board that should said franchise be granted within the time hereinafter stated, it will be ready, able and willing to supply your city, and its citizens, with the above mentioned service, on and after January 1, 1921, for such time and upon such terms as may be agreed upon.

That your Honorable Board will readily understand that if said franchise is to be granted your petitioner as prayed, it is a matter of first importance that it be granted as early as possible in order that your petitioner may take the necessary steps to provide an adequate supply of electricity for serving the City of Greensboro and its citizens and means for distributing same so that it may be in position to begin service on January 1, 1921.

Your petitioner, therefore, respectfully request- that it be advised within thirty days from the date hereof of the decision of your Honorable Board in the premises.

344 Respectfully submitted this 26 day of April, A. D. 1920.
Southern Power Company. Chas. I. Burkholder, Gen. Manager.

"Defendant's Exhibit 29."

Ordinance Granting Franchise to Southern Power Co. to Sell and Distribute Electricity, etc., in City of Greensboro.

An Ordinance Granting a Franchise to the Southern Power Company to Sell and Distribute Electric Current and to Construct, Maintain, and Use Poles, Wires, etc., for Conveying Such Current in the City of Greensboro, and to Submit the Franchise to the Qualified Voters of said City.

Be it ordained by the Board of Commissioners of the City of Greensboro:

Section 1. That the Southern Power Company, a corporation chartered and organized under and by virtue of the laws of New Jersey, its successors and assigns, are hereby granted the right, privilege and franchise to sell and distribute in the City of Greensboro electric current for power and lighting purposes; and to this end to construct, operate and maintain necessary posts, poles, wires and other necessary and proper fixtures and appliances in, through, along, upon and over the streets, avenues, alleys, parks and public squares of said city for the distribution, lease and sale of electric current for business, domestic and all other purposes for which such current may lawfully be sold, leased or used.

Section 2. That all posts, poles, wires, fixtures and other appliances erected, or constructed, by said Southern Power Company shall be erected, constructed, maintained and operated under the supervision of the City of Greensboro, through its properly
345 constituted officers. That said company shall place its poles and wires so as not to interfere with other poles and wires now upon the streets of the city.

Section 3. That said Southern Power Company shall save the City of Greensboro harmless from all damage or injury occasioned any person or property by the poles, wires, and appliances, or by the agents, employees or servants of said company.

Section 4. That all posts, poles, wires, fixtures and other appliances used by said Southern Power Company shall be of good

quality, and the said company shall make use of all known appliances and fixtures for making as safe as possible the conduct of electric current over and along streets and other public places of the city; and the city Governing Board shall have the power from time to time to require poles of any particular kind, class or design to be used on business or residential streets of the city where it is desirable to improve the appearance of said streets and to remove unsightly poles and fixtures therefrom. The city Governing Board may by ordinance require the wires of said Southern Power Company to be placed under ground in the business sections of the city, if wires of other companies are also required to be placed under ground. All wiring done by said company shall be done according to rules of the National Fire Underwriters Code. The City of Greensboro shall have the right to run its fire-alarm or police-alarm wires on poles or in conduits of the company.

Section 5. That until the schedule of rates herein set out is modified, decreased or increased by the Corporation Commission, or other lawful authority of the State of North Carolina, the rates to be charged by the said Southern Power Company for electric current, based upon monthly consumption, shall not exceed the following:

Rates for Lighting Service.

	First 50 K. W. Hrs. 9c. per K. W. Hr.
	Next 50 K. W. Hrs. 8c. per K. W. Hr.
346	Next 100 K. W. Hrs. 7c. per K. W. Hr.
	Next 600 K. W. Hrs. 6c. per K. W. Hr.
	Next 200 K. W. Hrs., 5c. Per K. W. Hr.
	Next 1,000 K. W. Hrs., 4c. per K. W. Hr.
	Next 2,000 K. W. Hrs., 3½c. per K. W. Hr.
	Next 4,000 K. W. Hrs., 3c. per K. W. Hr.

If bills are paid within ten days after notice, the following discount will be allowed:

Five per cent on bills where the consumption is less than 100 K. W. Hrs. Three per cent on bills where the consumption exceeds 100 K. W. Hrs. The consumer to pay One Dollar per month as a minimum service charge, whether current equal to that in value shall be used or not, which charge shall not be subject to discount.

Rates for Power Service.

	First 50 K. W. Hrs. 6c. Per K. W. Hr.
	Next 150 K. W. Hrs. 5c. Per K. W. Hr.
	Next 300 K. W. Hrs. 4c. Per K. W. Hr.
	Next 500 K. W. Hrs. 2.5c. Per K. W. Hr.
	Next 1,000 K. W. Hrs. 2.3c. Per K. W. Hr.
	Next 3,000 K. W. Hrs. 2.0c. Per K. W. Hr.
	Next 5,000 K. W. Hrs. 1.7c. Per K. W. Hr.
	Next 10,000 K. W. Hrs. 1.6c. per K. W. Hr.
	Next 10,000 K. W. Hrs. 1.5c. per K. W. Hr.

Next 20,000 K. W. Hrs. 1.4c. per K. W. Hr.
Next 50,000 K. W. Hrs. 1.35c. per K. W. Hr.
Next 100,000 K. W. Hrs. 1.30c. per K. W. Hr.
Next 100,000 K. W. Hrs. 1.25c. per K. W. Hr.
Next 200,000 K. W. Hrs. 1.20c. per K. W. Hr.

The consumer to pay One Dollars per horsepower of connected load per month as a minimum service charge, whether current equal to that in value shall be used or not.

The Company may set up, in a place selected by it upon premises, such necessary meter or other appliances necessary to supply and measure the current, and shall at all times have access thereto; and upon cancellation or termination of contract it shall have the
347 right to remove the said meter and all its property from said premises.

That said Southern Power Company shall show on bills rendered by it meter readings at beginning and end of period covered by such bill.

Section 6. The franchise, powers, privileges and rights granted hereunder are for a period of thirty years from the date of granting of such franchise, unless the same are sooner revoked or forfeited as hereinafter provided.

Section 7. This franchise and all the rights, powers and privileges herein granted shall be forfeited, and this ordinance may be repealed, if any of the following things or conditions exist or happen:

(a) If the said Southern Power Company shall undertake to assign, transfer or set over this franchise or any of the rights, powers and privileges herein granted, without first obtaining the consent of the Governing Body of the City of Greensboro, which consent shall be in the form of an ordinance, and which ordinance may impose new terms upon the Southern Power Company, or its assigns;

(b) If said Southern Power Company, or its assigns, shall charge, collect, or undertake to collect, any higher rate or charge for electric current than the prices set out in this ordinance, or higher rates and charges than those fixed by the Corporation Commission or other lawful authority of the State of North Carolina and then in force;

(c) If the said Southern Power Company, or its assigns, fail to give to the City of Greensboro and the citizens and business enterprises thereof efficient public service and a regular and adequate supply of electric current, without unreasonable interruptions and delays;

(d) If the said Southern Power Company, or its assigns, shall wrongfully and unlawfully discriminate between customers of any class, or wrongfully fail or refuse to furnish electric current
348 to any person desiring the same within a reasonable time after application is made therefor. This shall not prevent the said Company, or its assigns, from requiring a reasonable cash deposit to secure the payment of bills, or from making such other reasonable regulations as may be commonly used and enforced by other companies similarly engaged.

(e) If the said Southern Power Company, or its assigns, shall fail to maintain its property in good condition throughout the full term of the grant, or persistently refused or fail to observe any reasonable regulation or requirement of the City of Greensboro with reference to the up-keep, maintenance and safe condition of its posts, poles, wires, fixtures and appliances;

(g) If the said Southern Power Company shall fail or refuse to furnish to the North Carolina Public Service Company current to be supplied to citizens and consumers in Greensboro until such time as the Southern Power Company is ready, able and willing to supply all citizens and consumers theretofore supplied by the North Carolina Public Service Company.

(f) If the said Southern Power Company, or its assigns, shall deliberately and persistently violate any ordinance of the City of Greensboro now in force, or which may hereafter be enacted, in the interest of public safety or good morals, or for other purposes, under the police power of the city;

Section 8. Sections 1 to 7, inclusive, of this ordinance shall not go into effect until submitted to the qualified voters of the City of Greensboro, and be approved by a majority of the votes cast at a special election, as provided by Section 28 of the City Charter.

Section 9. That a special election to vote upon the granting of said franchise is hereby called, to be held at the usual voting places in the City of Greensboro on June 26th, 1920.

Section 10. That for said election, registrars, and poll holders are hereby appointed, as follows, to wit:

349 Gilmer precinct (voting place, Eagle Hose Co.): J. B. Minor, registrar, T. G. McLean, poll holder, and R. A. Gilmer poll holder.

Morehead precinct (voting place, City Hall): E. F. Pascal, registrar, R. G. Hiatt, poll holder, and J. R. Cutchin, poll holder.

Section 11. That the registration books shall be opened on May 21, 1920, and be closed on June 12, 1920; the registrars shall be at the polling places from 9 A. M. until sunset on each Saturday during the period for registration. No new registration is required of voters heretofore registered for general city elections, and now qualified voters of their respective precincts in which they are registered.

Section 12. The City Clerk shall have printed, in sufficient quantities, and furnish to the registrars, before the day of the election, ballots for use in said election, which shall be in the following form, to-wit:

Official Ballot for Special Election June 26th, 1920.

Instructions to Voters.—If you favor granting franchise to Southern Power Company, make an X in upper square; if you oppose granting the franchise, make an X in lower square.

For Ordinance granting franchise to Southern Power Company, etc.

Against Ordinance granting franchise to Southern Power Company, etc.

Official Ballot. Attest. (fac-simile signature) — — —, City Clerk.

350 Section 13. If a majority of the ballots cast at said election shall be in favor of said ordinance, granting a franchise to the Southern Power Company, then Sections 1 to 7, inclusive, of this ordinance shall immediately go into effect; otherwise, said sections shall be null and void.

Section 14. Except as otherwise herein provide-, this ordinance shall go into effect upon its passage.

Section 75. This ordinance shall be published once a week for four weeks in each of the two daily newspapers of the city, over the signature of the City Clerk, and a certified copy posted at the City Hall; and same shall constitute notice of said elections, and registration of voters therefor, as by law provided. M. M. Boyles.

Defendant's Exhibit No. 30.

Report of Canvassing Board on Special Election Held June 26, 1920.

STATE OF NORTH CAROLINA,

County of Guilford.

City of Greensboro.

We the undersigned registrars and poll holders for the special election held on June 26th, 1920, at which was submitted to the voters the proposition of Granting Franchise to Southern Power Co. do hereby certify that we canvassed the returns from the two precincts for said election at 10 O'Clock A. M. on this date, as provided by law and found the result to be as follows:

Precinct.	For ordinance granting franchise to Southern Power Company, etc.	Against ordinance granting franchise to Southern Power Company, etc.
Morehead.....	(Thirty-eight) 38 Votes.....	(Five Hundred & Thirty-three) 533 Votes.
Gilmer.....	(Forty) 40 Votes.....	(Four Hundred & Fifty-seven) 457 Votes.
Totals.....	(Seventy-eight) 78 Votes.....	(Nine Hundred & Ninety) 990 Votes.

We, therefore, declare that as 78 Votes were cast for ordinance and 990 Votes were cast against ordinance granting Southern Power Company franchise said franchise to Southern Power Company has been defeated by the voters of the City, said ordinance calling election as set out and passed by Board of Commissioners May 17th, 1920, and recorded in Minute Book #8, Pages 389, 390, 391 and 392.

This the 28th day of June, 1920. (Signed) T. G. McLean, Chairman; (Signed) J. B. Minor, Reg.; (Signed) E. F. Paschal, Reg.;

(Signed) J. R. Coutchin, Secretary; (Signed) R. A. Gilmer;
(Signed) R. G. Hiatt, Canvassing Board, Registrars, and Poll Hold-
ers for said Election.

NORTH CAROLINA,
City of Greensboro:

*Report of Registrar and Poll Holders of Vote on Election Held June
26th, 1920, on Ordinance Granting Franchise to Southern Power
Company.*

The undersigned registrar and poll holders for election June 26th,
1920, in the City of Greensboro, report that the following is a true
and accurate return of said election in Morehead precinct.

The number of votes cast for said ordinance granting a franchise
to the Southern Power Company, etc., was Thirty-Eight (38).

The number of votes cast against said ordinance was Five-Hun-
dred and Thirty-Three (533).

Witness our hand and seals, this the 26th day of June, 1920. E.
F. Paschal, Registrar. [Seal.] J. R. Cutchins, Poll Holder. [Seal.]
R. G. Hiatt, Poll Holder. [Seal.]

352 NORTH CAROLINA,
City of Greensboro:

*Report of Registrar and Poll Holders of Vote on Election Held June
26th, 1920, on Ordinance Granting Franchise to Southern Power
Company.*

The undersigned registrar and poll holders for election June 26th,
1920, in the City of Greensboro, report that the following is a true
and accurate return of said election in Gilmer precinct.

The number of votes cast for said ordinance granting a franchise
to the Southern Power Company, etc., was Forty (40).

The number of votes cast against said ordinance was Four Hun-
dred & Fifty-Seven (457).

Witness our hand and seals, this the 26th day of June, 1920. J.
B. Minor, Registrar. [Seal.] T. G. McLean, Poll Holder. [Seal.]
R. A. Gilmer, Poll Holder. [Seal.]

Defendant's Exhibit No. 31.

*Agreement Between City of Greensboro and N. C. Public Service Co.,
Dated July 1, 1919.*

NORTH CAROLINA,
Guilford County:

Whereas, The City and the citizens of Greensboro are desirous of
having Elm Street re-paved from the Southern Railway crossing
to Church Street, and co-operating with the abutting property own-

ers and the North Carolina Public Service Company in increasing its facilities and beautifying said Street, as well as
353 East and West Market Streets from Davie Street to Green Street, by having the North Carolina Public Service Company remove the present wooden poles and over head service wires now along and on said Streets, and constructing in place thereof a modern ornamental lighting system, suspended from neat iron posts; and

Whereas, The City further desires the North Carolina Public Service Company to extend its double track car line from the Court House Square to Church Street, in order to relieve congested traffic in this area; and

Whereas, The re-paving of said Elm Street and the extension of the double track will require the re-laying of the entire system of street railway along said street so paved, thus entailing heavy expense upon the North Carolina Public Service Company, in addition to the considerable cost of removing its present poles and overhead service wires on same and substituting and erecting iron posts; and

Whereas, The present ten-year contract between the City and the North Carolina Public Service Company for lighting its said streets expires next year, and the City and the North Carolina Public Service Company have mutually agreed upon the terms and conditions upon which the proposed improvements, changes and new construction work shall be done, and both parties desiring to renew the contract now existing between the City and the North Carolina Public Service Company for another period of ten years beginning at the expiration of the present contract:

Now, therefore, this agreement made and entered into this, the 1st day of July, 1919, by and between the City of Greensboro, a municipal corporation created and existing under and by virtue of the laws of said State, hereinafter referred to as the "City," party of the first part, and the North Carolina Public Service Company, a corporation created and organized under the laws of the State of North

Carolina, with its principal offices in the City of Greensboro,
354 hereinafter referred to as the "Company," party of the second part, witnesseth:

First. That for the purposes aforesaid, and in consideration of the obligations and duties undertaken to be performed, and the mutual stipulations and covenants entered into between the contracting parties hereto, the contract made and entered into between the North Carolina Public Service Company and the City of Greensboro on November 21st, 1910, and extending for a period of ten years, is hereby renewed and extended for a like period of ten years, beginning at the expiration of the present contract, and the contracting parties hereto mutually agree that the terms of said contract shall be binding upon each of them during the said extended period of ten years; and the penalties for out-ages shall apply to the new lights provided by this contract.

Second. In connection with the re-paving of Elm Street from the Southern Railway crossing to Church Street, it is agreed between the City and the Company that in the event the property owners

shall petition for the re-paving of same, as provided by the General Assembly of North Carolina, that the Company will furnish all of the necessary track material for the relaying of said track, including the re-laying of a double track from the Court House Square to Church Street, and pay for all of such material. The City on its part agrees to remove and re-lay the track along said street, and to lay the double track above referred to, and to furnish the necessary paving material and all labor for the laying of same, including the use of such of the present brick now upon said street in the re-building of the street between and along the said railway line; that the City shall keep an accurate account of the cost of such work, except the paving brick which may be re-used, for which the City is to make no charge, and render a statement thereof when completed to the Company. The repayment of this account, it is agreed between the parties, is to be made upon the same terms and conditions as the re-payment by the abutting property owners for work done on their account on said street by the City.

355 Third. In order to maintain a modern system of ornamental lighting of Elm Street and portions of East and West Market Streets, and to remove from the business portion of Elm Street the present overhead service wires and wooden poles now situated thereon to other streets and alleys, it is agreed on behalf of the Company to remove all of its said service wires and wooden poles and to install same on other streets, so as to serve the business property affected in the manner as indicated upon a blueprint made on June 5th, 1919, by W. H. Sullivan, and duly certified by him, which said blueprint is made a part of this contract, as indicating the proposed changes and new locations, it being understood that the parties hereto may from time to time by mutual agreement modify and change the details of said blueprint.

The Company also upon its part further agrees, with the cooperation of the property owners affected, to construct a modern ornamental lighting system at the points indicated upon said map, by the erection of seventy-two ornamental iron post-, each to carry one lamp of 350 Watts power, and to which poles shall be attached the necessary overhead trolley wires of the street railway system, and only such other wires as may be necessary to provide electric current for said ornamental lighting system.

The City on its part agrees to pay for twenty or more of said lamps, to be designated by it, the sum of \$58.00 per lamp when burning all night, the remaining lamps to burn until 11:00. Except Saturday night when they shall burn until 12:00 P. M. and for this service the City is to pay the sum of \$40.00 per lamp.

Fourth. It is mutually agreed between the parties hereto that any future extension of said ornamental lighting system which may be desired and installed during the life of this contract shall be governed by the same terms and conditions as herein provided.

Fifth. It is further stipulated and agreed by the Company that if on account of changed conditions, or for any other reason, the City shall be of opinion that the rates stipulated in the renewed contract,

356 or provided for in this supplemental contract, are unreasonable, the question may be referred to the State Corporation Commission for adjudication and settlement, and the existence of this contract for a term of years will not be pleaded by the Company as a bar to the City's right to have the Corporation Commission review and determine the reasonableness of the rates herein provided for.

In witness whereof, The parties hereto have caused these presents to be executed in duplicate in their respective corporate names by their proper officers and with their respective corporate seals affixed, the Company having heretofore authorized so to contract under its charter and by-laws and by resolution of its Board of Directors, and the City having been heretofore so authorized under and by virtue of a resolution of its Board of Commissioners passed at a meeting held in its Council Chamber in the City of Greensboro on the 9th day of July, 1919. North Carolina Public Service Company. Chas. B. Hole. (Seal.) City of Greensboro. E. F. Stafford Mayor. Attest: O. M. Hunt, City Clerk. (Seal.)

"Defendant's Exhibit No. 32."

Circular Letter Issued by North Carolina Public Service Co.

"Forget Sentiment," Urges the Southern Power Co.

That is One of the Tunes it Has Been Singing Ever Since it Threatened Greensboro with Utter Darkness if it Should be Refused a Franchise.

And why shouldn't the Southern Power Co. object to sentiment? Did you ever hear of a trust that employed any sentiment in its business? Does the manner in which the Southern Power
357 Co. has demanded a franchise in Greensboro suggest anything of sentiment in its business dealings?

To be capable of sentiment, the first requisite is to have a soul. That is true of either man or business; and in business, the men behind it must supply the soul. Whoever discovered anything in the machinations of the American Tobacco Co. suggestive of either soul or sentiment? Did its operations, years ago, in swallowing up and destroying the smaller tobacco manufacturers of North Carolina indicate anywhere in its organization the existence of any trait even remotely bordering upon human sympathy?

The Southern Power Co. is fathered and fed by the same men—men who have consistently defied and held in contempt the institutions of our government—who established the American Tobacco Co. And just now they are fostering a far more dangerous trust than the American Tobacco Co. ever dreamed of being, since it involves the State's water power and the right of its people to be served by this power.

Sentiment? It's trash to them! What they are after is the dollar, and they have found sentiment a poor way of getting it in the quan-

ties which their avaricious, gorging natures demand. Therefore, they would abolish sentiment from the face of the earth, especially in so far as it touches any business enterprise in which they hold an interest.

How would you like for Greensboro—yourself—to be dependent upon a pirate crew such as they have proved themselves to be?

The North Carolina Public Service Co. is perfectly willing to meet the present issue on the basis of facts; its case is resting on nothing else. But not the least of these facts is the sentiment which years of service to the people of Greensboro has created in our favor.

It means something to us—far more than money, indeed—that when representatives of the Southern Power Co. appeared before the Commissioners of Greensboro demanding an election on this franchise matter, more than 200 public spirited business men and citizens were there to protest against even this much concession to the Duke Trust.

And not one man—outside of the attorney employed and
358 paid to ram its demands down Greensboro's throat—lifted his voice in support of the Southern Power Co.!

Of course they want you to forget sentiment! They want you to forget that the North Carolina Public Service Co. has served the public of Greensboro acceptably; that it has stood shoulder to shoulder with the progressive men of Greensboro in the work of building a city; that its interests have ever coincided with the best interests of our city as a whole.

The sole regard in which the Southern Power Co. holds Greensboro is that it is a community in which threats are the only implements of persuasion; that by these threats it may be enabled eventually to reap a harvest of tribute, when Greensboro is within its power. Do the good people of Greensboro appreciate thus being branded a community of cravens? And are they willing to concede that business will continue to be good business when the element of sentiment is removed? We believe not. N. C. Public Service Co. Chas. B. Hole, President.

Defendant's Exhibit No. 33.

*Circular Letter Issued by North Carolina Public Service Co. Dated
June 16, 1920.*

June 16, 1920.

Which Will You Believe, the Southern Power Co. or the Supreme Court of North Carolina?

The Southern Power Co., in presenting the demand upon Greensboro that it be granted a franchise to sell lighting and power current "direct to the consumer" here—a demand backed by the autocratic threat that unless its wishes be complied with, all of its current would be cut off from Greensboro on January 1, 1921—makes this statement:

359 "It (Southern Power Co.) claims and hereby asserts the right to render such service directly to the city and its citizens of Greensboro, to whom alone it is responsible, and not through the medium of the North Carolina Public Service Co., to whom it owes no public duty."

That statement is in direct contempt of the Supreme Court of North Carolina, since it asserts a right that the Court denied in a written decision handed down but a few months ago. And that decision was in a case exactly paralleling the situation now existing in Greensboro.

In Salisbury, ten years ago, the Southern Power Co. induced this company to abandon its steam generating plant and use water power current, which the Southern Power Co. contracted to supply for a period of ten years; and at the same time contracted to sell to its subsidiary, Southern Public Utilities Co., for its uses in various cities, current for a period of years extending to 1944. When our own contract expired the Southern Power Co. assumed the position with reference to us exactly as set forth in the statement above.

Carried to the Supreme Court for decision, that honorable body declared that since the Southern Power Co., in the beginning, had elected to sell to public service companies, "It dedicated its property to this particular class of public use, and cannot discriminate in charge or service between the several members of this class, for this would be a license to discriminate among cotton mills as a class, furniture factories, etc."

In other words, our Supreme Court makes the unqualified statement that the Southern Power Co. must sell its current to public service corporations, and that charge and service to each must be alike!

Therefore—will you believe the Southern Power Co. when it threatens to cut off its current from Greensboro next January, unless its demands are complied with; or will you believe the Supreme Court of North Carolina when it tells you that the Southern Power Co. must continue that service?

We feel in assuring you that, whether you grant the Southern Power Co. a franchise or not, its current will not be cut off
360 from Greensboro—next January or any other time, unless the people of Greensboro so choose!

And we feel free in giving you such an assuring because we believe that the State of North Carolina is bigger than the Southern Power Co.!

Do you feel that same confidence in our State and its institutions?

If you do, you will not suffer yourself to be browbeaten by this high-handed band of water power pirates who very apparently hold laws and governments in contempt, and recognize no such thing as public obligation; and on June 26 your ballot will indicate your own contempt for their threats. N. C. Public Service Co. Chas. B. Hole, President.

Defendant's Exhibit 34.

Letter Dated June 16, 1920, Signed N. C. Public Service Co., Chas. B. Hole, President.

N. C. Public Service Company,
General Offices.

Greensboro, N. C., June 16, 1920.

DEAR SIR: How about your street car and gas service? Have you considered the effect upon these that granting a lighting and power franchise to the Southern Power Co. might have?

The operation of a street railway system in Greensboro, in a manner and on such schedules as demanded by a proper service to the public, is not a money-making business. Rather, it has been a constant drain on the resources of the company that has served you. Yet such a service has been maintained; and, we believe, one acceptable to the Greensboro public.

An adequate gas service, and gas supply—especially in recent months—has become a problem of ever-increasing proportions. The gas industry has never faced a greater crisis in its history, owing primarily to the difficulty of obtaining gas producing fuels, coal and oil, of proper quality and in sufficient quantities. Yet, despite these difficulties and the handicaps under which we have been forced to operate—to say nothing of the enormous additional outlays required by constantly increasing costs—your Public Service Company has maintained this service at as high a standard as it is possible to make it; and without additional cost to the consumer!

It is but fair for you to know that a public service cannot be operated here, as a financially successful business proposition, that is dependent upon street railway and gas receipts as its principal source of revenue! It must have, also, the undivided revenue derived from lighting and power current in order to live!

If you grant this franchise to the Southern Power So. to come into Greensboro and furnish light and power current, thereby dividing this part of the business, what may be expected as the eventual outcome?

Either one of two things must result:

Street railway fares and gas rates must be advanced in order to provide a revenue capable of taking care of the business—or—Your Public Service Company, should it be denied such a course, would eventually be bankrupted and the city left with no street car or gas service whatever; or, barring that condition, a service that would be so crippled by impoverishment that it would be worse, if possible, than none at all, because it would not be dependable.

Has the Southern Power Co. indicated any interest in this end of our service to the public? None whatever.

Can you reasonably expect that it will assume responsibility for the maintenance of a service to Greensboro that is admittedly un-

profitable? The franchise it has asked for would not point
362 to such a conclusion. It has asked, merely, for the lighting
and power privilege—the cream of the business!

This is the point we want you particularly to bear in mind:—

Should the Southern Power Co. be granted this franchise and, as a result, your Public Service Company should be bankrupted, its gas and street railway service destroyed through failure, the Southern Power Co. will be under no obligation whatever to the people of Greensboro to take over these two branches of the business and operate them for the service of the community!

And—after threatening Greensboro with darkness in the event of our people refusing its demand for a franchise—can you reasonably expect that the Southern Power Co. would be impelled by any motives of public spirit or love for our city to undertake a proposition that promised it no dividends?

It is a phase of the proposition that warrants careful weighing, fullest consideration, before making the decision as to how your ballot shall be cast on June 26—providing, of course, you have ever felt inclined to turn your city over to the “tender mercies” of this grasping water power trust, full brother to the American Tobacco Company with “Buck” Duke as its “father.” N. C. Public Service Co. Chas. B. Hole, President.

Defendant's Exhibit No. 35.

Letter Signed N. C. Public Service Co., Chas. B. Hole, President.

A Home Enterprise vs. a Foreign Monopoly.

The North Carolina Public Service Co. is a Greensboro
363 Company, operated by Greensboro people and giving employment to Greensboro people.

The Southern Power Co. is a Water Power Trust organized in and chartered by the State of New Jersey, with absolutely no local interests.

But the Southern Power Co. does not hesitate to come to you and say that you must vote your home enterprise out of business—by taking away or dividing the only profitable end of the business—or have its current shut off from your use.

Of course the Southern Power Co. cannot carry out that threat, but we are glad they made it, for the reason that you have been given an insight into its business methods, if for no other.

It gives Greensboro a foretaste of what they might expect from the Southern Power Co. should it be granted a franchise and eventually control the public service end of your city—or scrap it, as they choose.

Do you, as a public spirited citizen of the city, care to take a chance like that, with a company that openly expresses its contempt for our city?

Or do you prefer to continue doing business with a home enterprise, the officials and employees of which are your neighbors and friends; with whom you have a common interest in life?

The North Carolina Public Service Co. gives employment to hundreds of people; and it deals squarely with them, as it does with the public whom it serves. That, we believe, is evidenced in the fact that this company has never known the slightest labor trouble—not so much as a hint of it. You, as a consumer know of the character of the company as its relations have to do with the public. We leave it to these men, citizens of Greensboro, to tell you—if you have a desire to be better informed about the matter—about the company's policy towards its men, to those who contribute to its success and your service: N. C. Public Service Co. Chas. B. Hole, President.

364

"Defendant's Exhibit No. 36."*Certificate of Incorporation of Southern Power Company.*

This is to certify that the undersigned do hereby associate themselves into a corporation under and by virtue of the provision of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations, (Revision of 1896)" and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite their respective names.

First. The name of the corporation is Southern Power Company.

Second. The location of the principal office in this state is No. 259 Washington Street, in the City of Jersey City, County of Hudson.

The name of the statutory agent therein and in charge thereof, upon whom process against this corporation may be served, is Frank P. McDermott.

Third. The objects for which the corporation is formed are: To purchase, acquire, lease, manage, control and operate and to sell, lease and dispose of to such person or persons, corporation or corporations, and for such price or prices and on such terms and conditions as to this corporation may seem proper, water, water rights, power privileges and appropriation for mining, milling, agricultural and other uses and purposes; and to develop, control, generally deal in and dispose of to such person or persons, corporation or corporations, and for such price or prices, and on such terms and conditions, as to the corporation may seem proper electrical and other power for the generation, distribution and supply of electricity for light heat and power, and for any other uses and purposes to which the same are adapted.

365 To manufacture, generate, but, sell accumulate, store, transmit, furnish and distribute electric current for light, heat and power;

To manufacture, buy, sell, lease, let or operate any or all machinery or appliances for the manufacture, generation, storage, accumulation, transmission or distribution of any or all types of electric current, and any or all manner of electric machinery, apparatus or supplies of any nature or kind whatsoever.

To erect, buy, sell, operate and lease and let power plants and generating stations for the manufacture, generation, accumulation, storage transmission and distribution of electric current and any or all machinery used therein or in connection therewith.

To manufacture, buy, sell, lease and let fixtures, chandeliers, electroliers, brackets, lamps, globes and other supplies and appurtenances used for and in connection with the manufacture, generation, accumulation, storage, transmission, distribution or use of electric current for light, heat or power, or otherwise, and to carry on a general business of electricians, mechanical engineers, suppliers of electricity for the purpose of light, heat or power and otherwise and install, erect and operate, sell or lease wires, cables and fixtures, both interior and exterior, for the transmission and use of electric current; and to manufacture and deal in all apparatus and things required for or capable of being used in connection with the generation, distribution, supply, accumulation and employment of electricity.

To buy, sell, operate or lease pole lines, erect poles, string wires thereon, or on poles of other individuals or corporations, on any and all streets, avenues, highways and roads, or counties, townships, towns, villages and cities, and over and under all canals and other water-ways, and across any and all bridges, and to use the same either for the transmission of electric current for delivery to consumers on such lines or for transmission of current to independent vendors thereof, and to sell or lease to other individuals or corporations the right to string electric wires on or attach electric wires to any or all poles so erected, owned or leased, and to use such lines both as through lines and for local delivery:

To build and construct and use, for any of the purposes stated above, underground subways or conduits in such streets, avenues, highways and road, and under such canals and other waterways and string electric wires or conductors therein, and to buy or lease from or sell or let to any other individual or corporation the right to string and to use as aforesaid said electric wires or conductors in any such subways:

To engage in the business of electric lighting, and to engage in the business of manufacturing cloth, paper, wooden ware or any other articles of merchandise, in the manufacture of which electricity or electric power may be used.

To produce purchase, sell and deal in farm and dairy products and the various materials entering into or used in the production thereof:

To acquire, hold, own, sell, transfer and assign the whole or any part of the capital stock or other securities of any corporation similarly engaged:

To enter into, make, perform and carry out contracts of every kind and for any lawful purpose, with any person, firm, association or corporation:

To issue bonds, debentures or obligations of the Company for time to time for any of the objects or purposes of the Company and to secure the same by mortgage, pledge, deed of trust or otherwise:

To the extent and in the manner permitted by local laws, to conduct business in any of the states, territories, colonies or dependences of the United States, in the District of Columbia, and in any or all foreign countries to have one or more office- therein and therein to hold, purchase, mortgage, lease and convey real and personal property:

Nothing herein shall empower the said corporation to construct, maintain or operate railroads, telephone or telegraph lines, canal, turnpikes or any other business which shall need to possess the right of taking and condemning lands within the State of New Jersey; but nothing herein contained shall prevent the taking and condemnation of lands without the State of New Jersey.

Fourth. The total amount of the authorized capital stock of this corporation shall be Seven Million, five hundred thousand Dollars (\$7,500,000), divided into Seventy-five thousand (75,000) 367 shares of the par value of One Hundred Dollars (\$100.00) Dollars each. Of said stock 25,000 shares are to be preferred stock and 50,000 shares are to be common stock.

The preferred stock may be issued as and when the Board of Directors shall determine, and shall entitle the holders thereof to receive out of the surplus or net earnings of the corporation, and the corporation shall be bound to pay thereon as and when declared by the Board of Directors, a dividend at the rate of, but never exceeding, seven (7%) per centum per annum, cumulative from and after the date of the filing of this certificate payable yearly, half-yearly or quarterly, before any dividend shall be set apart or paid on the common stock.

In case of liquidation or dissolution or distribution of the assets of the corporation, the holders of the preferred stock shall be paid the par amount of their preferred shares and the amount of dividends accumulated and unpaid thereon, before any amount shall be payable to the holders of the common stock; the balance of the assets of the corporation shall be distributed ratably among the holders of the common stock.

Fifth. The names and post office addresses of the incorporators, and the number of shares subscribed for by each, the aggregate of such subscriptions being the amount of capital stock with which the Company will commence business, are as follows:

Name.	Post office address.	Common stock, shares.
R. B. Arrington.....	259 Washington St., Jersey City, N. J.....	Four.
E. B. Sperry.....	259 Washington St., Jersey City, N. J.....	Three.
W. R. Journeay, Jr.....	259 Washington St., Jersey City, N. J.....	Three.

Sixth. In furtherance and not in limitation of the powers conferred by statute, the Board of Directors are expressly authorized:

To hold their meetings, to have one or more offices and to keep the books of the company within or without the State of New Jersey;

368 but the Company shall always keep at its registered office in New Jersey a transfer book in which the transfers of stock can be made, entered and registered, and also a stock book containing the name and addresses of the stockholders and the number of shares held by them respectively, which shall be, at all times during business hours, open to the inspection of the registered stockholders in person:

To determine from time to time, whether and if allowed, under what conditions and regulations the accounts and books of the Company (other than the stock and transfer books) or any of them shall be open to the inspection of the stockholders, and the stockholders' rights in this respect are and shall be restricted or limited accordingly:

To make, alter, amend and rescind the by-laws of the Company, to fix the amount to be reserved as working capital, to fix the time for the declaration and payments of dividends, to authorize and cause to be executed mortgages and liens upon the real and personal property of the Company provided, always, that a majority of the whole Board concur therein:

With the consent in writing and pursuant also to the affirmative vote of the holders of a majority of the stock issued and outstanding, at a stockholders' meeting duly called for that purpose, to sell, assign, transfer or otherwise dispose of the property of the Company as an entirety, provided, always, that a majority of the whole Board concur therein:

The Company may use and apply its surplus earnings or accumulated profits to the purchase or acquisition of property from time to time, to such extent and in such manner, and upon such terms as its Board of Directors shall determine, and the property so purchased and acquired shall not be regarded as profits for the purpose of declaration of payment of dividends, unless otherwise determined by a majority of the Board of Directors.

Subject to the foregoing provisions, the by-laws may prescribe the number of Directors to constitute a quorum at their meetings, and such number may be less than a majority of the whole number.

The Company reserves the right to amend, alter, change or repeal any provision contained in this certificate in the manner now or hereafter prescribed by statute for the amendment of the Certificate of Incorporation.

369 The number of Directors may be fixed by the by-laws of the Company and upon any increase in the number of Directors there shall be deemed thereby vacancies created, to be filled by the Board until the next annual meeting of the stockholders.

Seventh. The existence of the corporation shall commence on the date of the filing of this certificate in the office of the Secretary of State, and shall continue perpetually.

In witness whereof, we have hereunto set out hands and seals, this 20th day of June, A. D. 1905. R. B. Arrington. (Seal.) E. B. Sperry. (Seal.) W. R. Journeay, Jr. (Seal.) Signed sealed and delivered in the presence of: F. N. De Rossett.

STATE OF NEW YORK,
County of New York:

Be it known, that on the 20th day of June 1905, before me, F. Nash De Rosset, a Foreign Commissioner of Deeds for the State of New Jersey, in the State of New York, personally appeared R. B. Arrington, E. B. Sperry and W. R. Journeay, Jr., who I am satisfied are the persons named in and who executed the foregoing certificate; and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

Witness my hand and official seal at the city of New York, in the county and state of New York, this 20th day of June 1905. F. Nash De Rosset, Foreign Commissioner of Deeds for New Jersey in New York. (Seal.)

370 Endorsed: "Received in the Hudson Co., N. J. Clerk's Office June 22 A. D. 1905 and Recorded in Clerk's Record No. — on page —. John Rotherham, Clerk.

"Filed and Recorded Jun. 22, 1905. S. D. Dickinson, Secretary of State."

Endorsed as follows: "Filed Oct. 19, 1915. Jas. T. Smith, C. S. C."

"Filed Jul. 18, 1905. J. Bryan Grimes, Secretary of State."

State of North Carolina,
Department of State.

Raleigh, Oct. 9th, 1915.

I, J. Bryan Grimes, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached sheets to be a true copy of the certificate of incorporation of Southern Power Company, as taken from and compared with the original filed in this office on July 18th, 1905 for the purpose of duly domesticating said corporation pursuant to the provisions of Section 1194 of the Revisal of 1905.

In testimony whereof I have hereunto set my hand and affixed my official seal, this the 9th day of October, A. D. 1915. J. Bryan Grimes, Secretary of State. (Seal.)

371 **Defendant's Exhibit No. 37.**

Agreement Between Southern Power Co. and Leaksville Light and Power Co.

Memorandum of Agreement, Made and entered into this 12th day of July, 1916, by and between Southern Power Company, a corpora-

tion organized and existing under the laws of the State of New Jersey, party of the first part, hereinafter designated as and called the "Power Company," and Leaksville Light and Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, party of the second part, hereinafter designated as and called the "Consumer," witnesseth:

That in consideration of the mutual covenants and agreements hereinafter contained, the expected performance thereof, the electric power to be delivered, the sums of money to be paid, and other valuable considerations, the parties hereto, for themselves, their successors and assigns, have mutually agreed and do agree with each other as follows:

First. The Power Company agrees that it will deliver, supply and furnish the said consumer electricity or electric power, and said consumer hereby agrees to receive, use, consume and pay for such electricity or electric power, at the time and place, for the purpose and in the manner and in accordance with the terms, limitations and conditions hereinafter set forth, for and during, and this contract shall continue in force for the term of ten (10) years from the day or date on which the delivering of the electricity or electric power hereunder is and shall be actually begun.

Second. The electric power to be supplied hereunder shall be three-phase alternating, and at approximately sixty cycles per second periodicity, and at a voltage to be determined upon from time to time by said Power Company and at approximately 2,400
372 volts, said electric power shall be delivered and supplied by the Power Company to the consumer at a terminal or delivery point to be selected by the Power Company, located in or near the town of Spray, about two miles from Leaksville, in the County of Rockingham, State of North Carolina, and shall be delivered twenty-four hours per day during the term of this contract, Sundays during daylight excepted:

Third. The maximum amount of electric power which the said Power Company shall or can be required to deliver or supply under this contract is and shall be 250 horse power; and said consumer expressly agrees that it will pay for all power received and used by it under this contract at the following scale of rates, based on monthly consumption:

0 to	100 K. W. Hours	9c. per K. W. Hour
100 "	150 " " "	8c. " " " "
150 "	200 " " "	7c. " " " "
200 "	300 " " "	6c. " " " "
300 "	400 " " "	5c. " " " "
400 "	500 " " "	4c. " " " "
500 "	1,000 " " "	3.5c. " " " "
1,000 "	2,000 " " "	3c. " " " "
2,000 "	4,000 " " "	2.6c. " " " "
4,000 "	8,000 " " "	2.2c. " " " "
8,000 "	16,000 " " "	1.9c. " " " "
16,000 "	32,000 " " "	1.7c. " " " "

32,000	"	50,000	K. W. Hours.....	1.5c.	per K. W. Hour				
50,000	"	100,000	" " "	1.45c.	" " " "	"	"	"	"
100,000	"	200,000	" " "	1.40c.	" " " "	"	"	"	"
200,000	"	400,000	" " "	1.30c.	" " " "	"	"	"	"
400,000	"	500,000	" " "	1.20c.	" " " "	"	"	"	"
500,000	and over	" " "	" " "	1.10c.	" " " "	"	"	"	"

And said consumer further agrees that it will pay as a minimum charge hereunder the sum of One Hundred and Twenty-five (\$125.00) Dollars per month, whether it shall use power equal in value under the terms of this contract to that amount or not. And it is agreed that the amount of electric power delivered hereunder when in excess of said minimum charge shall be charged for in the manner and at the rate herein provided. The payment for such electric power supplied hereunder, and any and all and every payment under this contract shall be made at the office of the Power Company at Charlotte, Mecklenburg County, North Carolina. Bills shall be rendered each month by said Power Company to said consumer for the amount due under this contract during the preceding month, and each and every and all such bills shall be payable by said consumer monthly, on or before the 15th day of each and every month, immediately succeeding or following the month in which said electricity or electric power shall have been delivered, furnished or supplied during the full term of this contract.

Fourth. The said electricity or electric power so furnished, delivered or supplied hereunder by said Power Company to said consumer is and shall be delivered, furnished and supplied for the purpose of its being used, consumed and applied by said consumer for lighting streets and public and private buildings, and for furnishing electric lights or electricity for lighting, heating and motive power to the inhabitants of the town of Leaksville and the vicinity thereof, and for other municipal purposes and said consumer is not permitted to and hereby agrees not to use, employ, consume or apply said electricity or electric power delivered, furnished or supplied hereunder, or any part thereof in place or places, or in any manner, or for any purpose or purposes, other than are provided for in this contract, and said consumer is not permitted to and hereby agrees not to sell or deliver said electric power to any one consumer in an amount in excess of 100 horse power.

Fifth. And said Power Company agrees that it will begin to deliver and supply said electric power herein contracted for, or be ready, willing and able to do so on or before the 15th day of May 1917. And said consumer agrees that it will receive said electric power or be ready, willing and able to do so, on or before said date.

Sixth. It is expressly understood and agreed that in the event that said consumer uses the said electric power or any part thereof, for pumping the water supply to be used for extinguishing a fire or fires, then the said Power Company shall not be liable to said consumer, nor to any of the inhabitants of the said town of Leaksville or the vicinity thereof, nor to any person, firm or corporation for any loss

374 or injury of or to property or persons by fire or fires, occasioned by or resulting directly or indirectly from the failure of the pump or pumping apparatus or appliances to operate, whether the said failure shall be due to the act of the said Power Company or otherwise,—it being the intention of the parties hereto that said Power Company shall not in any event be liable for loss or losses or damage occasioned by fire or fires which may be caused by or result from the failure of the said Power Company to supply electric power to operate such or any pump or pumping apparatus and appliances.

Seventh. All of such electric power which shall be leased, sublet or otherwise disposed of by said consumer to any other person or persons, corporation or corporations, shall be leased, sublet, or disposed of under a contract, each of which contracts shall be subject to this contract.

Eighth. Neither party hereto shall be responsible for accident or injury or damage to the machinery, apparatus, appliances or other property of the one caused by lightning, defects in or a failure of the machinery, apparatus or appliances of the other; and it is expressly understood and agreed that the said Power Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for, and that said Power Company shall not be in any way responsible for the transmission or control of said electric power or currents beyond such point of its delivery to said consumer, and shall not in any event, be liable for damages, or injury to any person or property whatsoever arising, accruing or resulting from in any manner, the receiving, use, consumption, application or distribution by said consumer of said electric power. And said consumer shall hold and save harmless the Power Company from any and all liabilities or liability to any person or property, incurred or sustained by the Power Company by reason of any negligence or misconduct on the part of the said consumer, its officers, agents, servants or employees.

Ninth. The furnishing, supplying and delivery by said Power Company of said electric power, and the receiving, use, consumption and application thereof, and payment therefor by 375 said consumer is and shall be subject to and in accordance with the following rules and regulations, which shall be deemed and taken to be and are hereby made a part of this contract, to-wit:

(A) For the purpose of ascertaining the amount of electric power being supplied under this contract, the Power Company may place and install upon the said premises of the Consumer and connect in circuit at the terminale of its power lines (said terminals to be established as hereinbefore provided for), such watt-meter or meters as in the opinion of said Power Company may or shall be necessary to measure and record the said electric power being supplied under this contract. All measuring instruments shall be of a good make and type, and shall be tested in the presence of representatives of both parties, at any time, upon the written request of either party to the other. If, as a result of such test any instrument shall be found to be inaccurate, it shall be rendered to a condition of accuracy satisfactory to the representatives of both

parties, or a new instrument or instruments calibrated to the satisfaction of such representatives, shall be substituted. If the inaccuracy of any instrument shall exceed two (2%) per cent., then the readings of such instrument previously taken shall be corrected on the basis of such test, but not for more than thirty days prior to the date of test, nor prior to a date within thirty days on which such meters may have proven accurate within two (2%) per cent. And it is further understood and agreed that said meter or meters may be read by the Power Company as often as either party hereto may deem advisable. It is understood and agreed that in the computation of power measured, seven hundred and forty-six (746) watts shall constitute one horse power within the meaning of the terms as used in this contract.

(B) The said Power Company shall provide a regular and uninterrupted power service, and the said Consumer will regularly and continuously receive, use and apply the same in such manner as it may be needed, not exceeding the maximum amount 376 named, and such additional power as may be taken as hereinbefore provided for; but in case the said Power Company shall be wholly or partially prevented from delivering, furnishing or supplying said electric power hereunder, or in case the service thereof shall be interrupted or suspended or fail, or in case said Consumer shall be prevented from receiving, using, consuming and applying said electric power by reason of or through strike, stoppage in labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any court or judge granted in any bona fide adverse legal proceeding or action, or any order of any civil authority, explosion, act of God or of the public enemies, or any cause reasonably beyond its control and not attributable to its neglect, then and in such event said Power Company shall not be obligated to deliver, furnish, or supply said electric power hereunder during such period and shall not be liable for any damage or loss resulting from such interruption, prevention, suspension, or failure, and said Consumer shall not be obligated or liable to pay for such power not delivered, furnished or supplied during such period; and in any and all such event or events, the parties suffering such interruption, prevention, suspension or failure shall be prompt and diligent in removing and overcoming such cause or causes thereof; provided, however, that either party whose plant or system shall suspend operation by reason of accident to its machinery plant or system shall proceed at once to repair the same within a reasonable time, failing so to do the limit of or exemption from liability as fixed in this paragraph shall not apply and the party so failing shall be liable to the other as though no such limit or exemption had been fixed.

(C) The Power Company shall at all times during the continuance of this contract have the right of ingress to and egress from the premises of said Consumer for any and all purposes connected with the delivery, furnishing or supplying of electric power under this contract, or the exercise of any and all rights secured to or the performance of any and all obligations imposed upon it by this contract, during the terms of this contract.

377 (D) If default shall be made at any time by said Consumer in paying for electric power delivered, furnished or supplied to it by the Power Company under and pursuant to the terms of this contract, and if such default shall continue for a period of thirty days, then the Power Company shall have the right at its option to terminate this contract, or, at its option, without terminating or in anywise avoiding this contract, to discontinue, suspend, and withdraw the delivery, furnishing or supplying electric power hereunder, until payment of all money due to it under the terms hereof from the Consumer shall have been made; and this option may be exercised by the Power Company whenever, and as often as, any such default shall occur and continue for such period of thirty days, and delay or omission on the part of the Power Company to exercise such option whenever such default on the part of said Consumer shall occur at any time, shall not be deemed a waiver by the Power Company of its rights to exercise such option whenever at any subsequent time such default on the part of the Consumer shall occur. And in the event of such default in the payment or at the terminating of or expiration of this contract, then it shall be lawful for, and the said Consumer does hereby authorize and empower the Power Company, its successors and assigns, officers, agents or employees, with the aid and assistance of any person or persons to enter in and upon the said premises of the Consumer, and such other place or places whatsoever as or in which any meter, apparatus, appliances, fixtures or other property of said Power Company, is, or may be, and remove, take and carry away same.

(E) Said Consumer agrees that should it use said power for lighting the streets and public places of the Town of Leaksville, or sell the same to the inhabitants of the said Town of Leaksville or the vicinity thereof for lighting purposes, that it will install and maintain proper regulating and controlling devices.

(F) No change in, modification, alteration or enlargement of this contract shall be valid or binding unless endorsed hereon in writing at the time the same is made, and signed by the parties hereto.

378 (G) This contract is not binding upon the Power Company until ratified and approved by the Board of Directors of said Company.

(H) It is mutually understood and agreed that no claims or demands which the Consumer may have against the Power Company shall be set-off or counter-claimed against the payment of any bill for electric power furnished hereunder, and all bills shall be paid as herein provided, regardless of such claims or demands.

In witness whereof, on the day and year first above written, the said parties hereto have hereunto caused this agreement to be signed in duplicate, and caused their respective corporate names to be subscribed, and their corporate seals to be affixed hereto by their respective Presidents or Vice-Presidents, and attested by their respective Secretaries or Assistant Secretaries, duly authorized by resolution duly adopted by their respective Boards of Directors. Southern Power Company, by W. Gill Wyle, Vice President. Attest:

N. C. Parker, Secretary. (Seal.) Leaksville Light & Power Company, by J. B. King, Vice-President. (Seal.) Attest: E. B. King, Secretary.

Endorsed: "Approved by N. Y. Office March 23, 1917."

Leaksville Light & Power Co.,

Leaksville, N. C.

March 14, 1917.

Southern Power Company, Mr. John W. Fox, Charlotte, N. C.

379 DEAR SIR: On July 12th, 1916 we signed a contract with you for power to be delivered to us by October 1st.

Confirming our request over the telephone yesterday we shall be glad if you will change our contract to read from May 15th, 1917 for delivery of power to us from your lines, sooner if possible.

Thanking you to make this change. Yours very truly, Leaksville Light & Power Co. K.: M.

Defendant's Exhibit No. 38.

Agreement Between Southern Power Co. and Norwood Light & Power Co., Dated May 1, 1916.

Memorandum of Agreement, Made and entered into this First day of May A. D. 1916, by and between Southern Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the first part, hereinafter designated as and called the "Power Company," and Norwood Power & Light Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, party of the second part, hereinafter designated as and called the "Consumer," Witnesseth:

That in consideration of the mutual covenants and agreements hereinafter contained, the expected performance thereof, the electric power to be delivered, the sums of money to be paid, and other valuable considerations, the parties hereto, for themselves, their successors and assigns, have mutually agreed and do agree with each other as follows:

First. The Power Company agrees that it will deliver, supply and furnish the said Consumer electricity or electric power, and the said Consumer hereby agrees to receive, use, consume and pay for such electricity or electric power, at the time and place, for the purpose and in the manner and in accordance with the
380 terms, limitations and conditions hereinafter set forth, for and during, and this contract shall continue in force for the term of Ten (10) years from the day or date on which the delivering of the electricity or electric power hereunder is and shall be actually begun.

Second. The electric power to be supplied hereunder shall be three-phase alternating, and at approximately sixty cycles per sec-

ond periodicity, and at a voltage to be determined upon from time to time by said Power Company, and at approximately 2,200 volts; Said electric power shall be delivered and supplied by said Power Company to said Consumer where the wires of the Consumer connect with the wires of the Power Company at the outside wall of the Power Company's substation, situated near Norwood Cotton Mills, at or near Norwood, in the County of Stanly, State of North Carolina, as a terminal or delivery point, and shall be delivered twenty-four (24) hours per day during the term of this contract, Sundays during daylight excepted.

Third. The maximum amount of electric power which the said Power Company shall or can be required to deliver or supply under this contract is and shall be 50 Horse Power, and said Consumer expressly agrees that it will pay for all power received and used by it under this contract at the following scale of rates, based on monthly consumption:

0 to	100 K. W. Hours.....	9c. per K. W. Hour
100 "	150 " " "	8c. " " " "
150 "	200 " " "	7c. " " " "
200 "	300 " " "	6c. " " " "
300 "	400 " " "	5c. " " " "
400 "	500 " " "	4c. " " " "
500 "	1,000 " " "	3.5c. " " " "
1,000 "	2,000 " " "	3c. " " " "
2,000 "	4,000 " " "	2.6c. " " " "
4,000 "	8,000 " " "	2.2c. " " " "
8,000 "	16,000 " " "	1.9c. " " " "
16,000 "	32,000 " " "	1.7c. " " " "
32,000 "	50,000 " " "	1.5c. " " " "
50,000 "	100,000 " " "	1.45c. " " " "
100,000 "	200,000 " " "	1.40c. " " " "
200,000 "	400,000 " " "	1.30c. " " " "
400,000 "	500,000 " " "	1.20c. " " " "
500,000 and over	" " "	1.10c. " " " "

And the Consumer further agrees that it will pay as a minimum charge hereunder the sum of Twenty-five (\$25.00) Dollars 381 per month whether it shall use power equal in value under the terms of this contract to that amount, or not. And it is agreed that the amount of electric power delivered hereunder, when in excess of said minimum charge, shall be charged for in the manner and at the rates herein provided. The payment for such electric power supplied hereunder, and any and all and every payment under this contract shall be made at the office of the Power Company at Charlotte, Mecklenburg County, North Carolina. Bills shall be rendered each month by said Power Company to said Consumer for the amount due under this contract during the preceding month, and each and every and all of such bills shall be payable by said Consumer monthly, on or before the 15th day of each and every month, immediately succeeding or following the month in which

said electricity or electric power shall have been delivered, furnished or supplied during the full term of this contract.

Fourth. The said electricity or electric power so furnished, delivered or supplied hereunder by said Power Company to said Consumer is and shall be so delivered, furnished and supplied for the purpose of its being used, consumed and applied by said Consumer for lighting the streets and public and private buildings, and for furnishing electric lights or electricity for lighting, heating and motive power to the Town of Norwood and its inhabitants in the vicinity thereof, and for municipal purposes in the said Town and vicinity only and for the purposes named; and said Consumer is not permitted to and hereby agrees not to use, employ, consume or apply said electricity or electric power delivered, furnished or supplied hereunder, or any part thereof, in place or places or in any manner, or for any purpose or purposes other than are provided for in this contract, and said Consumer is not permitted to and hereby agrees not to sell or deliver said electric power to any one consumer in an amount in excess of 35 Horse Power.

Fifth. And said Power Company agrees that it will begin to deliver and supply said electric power herein contracted for, or be ready, willing and able so to do on or before the 1st day of 382 August, 1916. And said Consumer agrees that it will receive said electric power, or be ready, willing and able so to do on or before said date.

Sixth. It is expressly understood and agreed that in the event that said Consumer uses the said electric power or any part thereof, for pumping the water supply to be used for extinguishing a fire or fires, then the said Power Company shall not be liable to said Consumer, nor to any of the inhabitants of the Town of Norwood or the vicinity thereof, not to any person, firm or corporation for any loss or injury of or to property or persons by fire or fires, occasioned by or resulting directly or indirectly from the failure of the pump or pumping apparatus or appliances to operate, whether the said failure shall be due to the act of the said Power Company or otherwise,—it being the intention of the parties hereto that said Power Company shall not in any event be liable for loss or losses or damage occasioned by fire or fires which may be caused by or result from the failure of the said Power Company to supply electric power to operate such or any pump or pumping apparatus and appliances.

Seventh. All of such electric power which shall be leased, sublet or otherwise disposed of by said Consumer to any other person or persons, corporation or corporations, shall be leased, sublet, or disposed of under contract, each of which contracts shall be subject to this contract.

Eighth. Neither party hereto shall be responsible for accident or injury or damage to the machinery, apparatus, appliances or other property of the one caused by lightning, defects in or failure of the machinery, apparatus, or appliances of the other; and it is expressly understood and agreed that the said Power Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for and that said Power Company shall not be

in any way responsible for the transmission or control of said electric power or current beyond such point of its delivery to said Consumer and shall not, in any event, be liable for damages or injury to any person or property whatsoever arising, accruing or
 383 resulting from, in any manner, the receiving, use, consumption, application or distribution by said Consumer of said electric power. And said Consumer shall hold and save harmless the Power Company from any and all liability or liabilities to any person or property, incurred or sustained by the Power Company by reason of any negligence or misconduct on the part of the said Consumer, its officers, agents, servants or employees.

Ninth. The furnishing, supplying and delivering by said Power Company of said electric power, and the receiving, use, consumption and application thereof, and payment therefor by said Consumer is and shall be subject to and in accordance with the following rules and regulations, which shall be deemed and taken to be and are hereby made a part of this contract, to wit:

(A) For the purpose of ascertaining the amount of electric power being supplied under this contract, said Power Company may place upon the said premises of said Consumer and connect in circuit at the terminals of its power lines (said terminals to be established as hereinbefore provided for) such watt-meters or meters as in the opinion of said Power Company may or shall be necessary to measure and record the said electric power being supplied under this contract. All measuring instruments shall be of a good make and type, and shall be tested in the presence of representatives of both parties, at any time, upon the written request of either party to the other. If, as a result of such test, any instrument shall be found inaccurate, it shall be rendered to a condition of accuracy satisfactory to the representatives of both parties or a new instrument or instruments calibrated to the satisfaction of such representatives, shall be substituted. If the inaccuracy of any instrument previously taken shall be — corrected on the basis of such test, but not for more than thirty days prior to the date of test, nor prior to a date within thirty days on which such meters may have proven accurate within two (2%) per cent. And it is further understood and agreed that said meter or meters may be read by the Power Company as often as either party hereto may deem advisable. It
 384 is understood and agreed that in the computation of power measured seven hundred and forty-six (746) watts shall constitute one horse power within the meaning of the terms as used in this contract.

(B) The said Power Company shall provide a regular and uninterrupted power service, and the said Consumer will regularly and continuously receive, use and apply the same in such a manner as it may be needed, not exceeding the maximum amount named, and such additional power as may be taken as hereinbefore provided for; but in case the said Power Company shall be wholly or partially prevented from delivering, furnishing or supplying said electric power hereunder or in case the service thereof shall be interrupted or suspended or fail, or in case said Consumer shall be prevented

from receiving, using, consuming and applying said electric power by reason of or through strike, stoppage in labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any court or Judge granted in any bona fide adverse legal proceeding or action, or any order of any civil authority, explosion, act of God or of the public enemies, or any cause reasonably beyond its control and not attributable to its neglect, then and in such event said Power Company shall not be obligated to deliver, furnish, or supply said electric power hereunder during such period and shall not be liable for any damage or loss resulting from such interruption, prevention, suspension, or failure, and said Consumer shall not be obligated or liable to pay for such power not delivered, furnished or supplied during such period; and in any and all such event or events, the parties suffering such interruption, prevention, suspension or failure shall be prompt and diligent in removing and overcoming such cause or causes thereof, provided, however, that either party whose plant or system shall suspend operation by reason of accident to its machinery, plant or system, shall proceed at once to repair the same within a reasonable time, failing so to do, the limit of or exemption from liability as fixed in this paragraph shall not apply, and the party so failing shall be liable to the other as though no such limit or exemption had been fixed.

385 (C) The Power Company shall at all times during the continuance of this contract have the right of ingress to and egress from the premises of said Consumer for any and all purposes connected with the delivery, furnishing or supplying of electric power under this contract, or the exercise of any and all rights secured to, or the performance of any and all obligations imposed upon it by this contract, during the life of this contract.

(D) If default shall be made at any time by said Consumer in paying for electric power delivered, furnished or supplied to it by the Power Company under and pursuant to the terms of this contract, and if such default shall continue for a period of thirty days, then the Power Company shall have the right at its option to terminate this contract, or, at its option, without terminating or in anywise avoiding this contract, to discontinue, suspend, and withdraw the delivery, furnishing or supplying electric power hereunder, until payment of all money due to it under the terms hereof from the Consumer shall have been made; and this option may be exercised by the Power Company whenever, and as often as, any such default shall occur and continue for such period of thirty days, and delay or omission on the part of the Power Company to exercise such option whenever such default on the part of said Consumer shall occur at any time shall not be deemed a waiver by the Power Company of its rights to exercise such option at any subsequent time such default on the part of the Consumer shall occur. And in the event of such default in the payment or at the termination or expiration of this contract, then it shall be lawful for, and the said Consumer does hereby authorize and empower the Power Company, its successors and assigns, officers, agents or employees, with the aid and assistance of any person or persons, to enter in and upon the said premises

of said Consumer, and such other place or places whatsoever as or in which any meter, apparatus, appliances, fixtures or other property of said Power Company is, or may be, and remove, take and carry away same.

(E) Said Consumer agrees that should it use said Power for lighting the streets and public places of the Town of Norwood, or sell the same to the inhabitants thereof for lighting purposes, 386 that it will install and maintain proper regulating and controlling devices.

(F) No change in, modification, alteration or enlargement of this contract shall be valid or binding unless endorsed hereon in writing at the time the same is made, and signed by the parties hereto.

(G) It is mutually agreed that no claim or demand which the Consumer may have against the Power Company shall be set off or counterclaimed against the payment of any bill for electric power furnished hereunder, and all bills shall be paid as herein provided, regardless of such claim or demand.

(H) This contract is not binding upon the Power Company until ratified and approved by the Board of Directors of said Company.

In witness whereof, on the day and year first above written, the said parties hereto have hereunto caused this agreement to be signed in duplicate and caused their respective corporate names to be subscribed, and their corporate seals to be affixed hereto by their respective Presidents or Vice-Presidents, and attested by their respective Secretaries or Assistant Secretaries, duly authorized by resolutions duly adopted by their respective Boards of Directors. Southern Power Company. B. N. Duke, Vice-President. Attest: N. C. Parker, Secretary. (Seal.) Norwood Power & Light Company, by J. F. Sherrin, President. Attest: Chas. E. Barker, Secretary. (Seal.)

"Approved by N. Y. Office. May 18, 1916."

387

Charlotte, N. C., May 6, 1916.

Mr. W. H. Martin, Office.

DEAR SIR: We attach hereto contract with the Norwood Power & Light Company which is for ten years at our standard No. 3 rate. These contracts are for executive approval. Yours truly, John W. Fox.

Defendant's Exhibit No. 39.

Agreement Between Southern Power Co. and Hillsboro Power & Lighting Co., Dated April 12, 1916.

Memorandum of agreement, Made and entered into this 12th day of April, A. D., 1916, by and between Southern Power Company, a corporation organized and existing under the laws of the State of New Jersey, party of the first part, hereinafter designated as and called the "Power Company," and Hillsboro Power & Lighting Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, party of the second part,

hereinafter designated as and called the "Consumer," Witnesseth:

That in consideration of the mutual covenants and agreements hereinafter contained, the expected performance thereof, the electric power to be delivered, the sums of money to paid, and other valuable considerations, the parties hereto, for themselves, their successors and assigns, have mutually agreed and do agree with each other as follows:

First. The Power Company agrees that it will deliver, supply and furnish the said Consumer electricity or electric power, and said Consumer hereby agrees to receive, use, consume and pay for such electricity or electric power, at the time and place, for the purpose and in the manner and in accordance with the terms, limitations and conditions hereinafter set forth for and during and this contract shall continue in force for the term of ten (10) years from the day or date on which the delivering of the electricity or electric power hereunder is and shall be actually begun.

Second. The electric power to be supplied hereunder shall be three-phase alternating, and at approximately sixty cycles per second periodicity, and at a voltage to be determined upon from time to time by said Power Company and at approximately 2,200 volts, said electric power shall be delivered and supplied by the Power Company to the Consumer where the wires of the Power Company connect with the wires of the Consumer, at the outside wall of the Power Company's sub-station, situate at or near Hillsboro, in the County of Orange, State of North Carolina, as a terminal or delivery point, and shall be delivered twenty-four hours per day during the term of this contract, Sundays during daylight excepted.

Third. The maximum amount of electric power which the said Power Company shall or can be required to deliver or supply under this contract is and shall be 100 Horse Power; and said Consumer expressly agrees that it will pay for all power received and used by it under this contract at the following scale of rates, based on monthly consumption:

0 to	100 K. W. Hours	9c. per K. W. Hour
100 "	150 " " " " " " " "	8c. " " " " "
150 "	200 " " " " " " " "	7c. " " " " "
200 "	300 " " " " " " " "	6c. " " " " "
300 "	400 " " " " " " " "	5c. " " " " "
400 "	500 " " " " " " " "	4c. " " " " "
500 "	1,000 " " " " " " " "	3.5c. " " " " "
1,000 "	2,000 " " " " " " " "	3c. " " " " "
2,000 "	4,000 " " " " " " " "	2.6c. " " " " "
4,000 "	8,000 " " " " " " " "	2.2c. " " " " "
8,000 "	16,000 " " " " " " " "	1.9c. " " " " "
16,000 "	32,000 " " " " " " " "	1.7c. " " " " "
32,000 "	50,000 " " " " " " " "	1.5c. " " " " "
50,000 "	100,000 " " " " " " " "	1.45c. " " " " "
100,000 "	200,000 " " " " " " " "	1.40c. " " " " "
200,000 "	400,000 " " " " " " " "	1.30c. " " " " "
400,000 "	500,000 " " " " " " " "	1.20c. " " " " "
500,000 and over	" " " " " " " "	1.10c. " " " " "

389 And said Consumer further agrees that it will pay as a minimum charge hereunder the sum of Fifty & no/one hundredth (\$50.00) Dollars per month, whether it shall use power equal in value under the terms of this contract to that amount or not. And it is agreed that the amount of electric power delivered hereunder when in excess of said minimum charge shall be charged for in the manner and at the rate herein provided. The payment for such electric power supplied hereunder, and any and all and every payment under this contract shall be made at the office of the Power Company at Charlotte, Mecklenburg County, North Carolina. Bills shall be rendered each month by said Power Company to said Consumer for the amount due under this contract during the preceding month, and each and every and all of such bills shall be payable by said consumer monthly, on or before the 15th day of each and every month, immediately succeeding or following the month in which said electricity or electric power shall have been delivered, furnished or supplied during the full term of this contract.

Fourth. The said electricity or electric power so furnished, delivered or supplied hereunder by said Power Company to said Consumer is and shall be delivered, furnished and supplied for the purpose of its being used, consumed and supplied by said Consumer for lighting streets and public and private buildings, and for furnishing electric lights or electricity for lighting, heating and motive power to the inhabitants of the Town of Hillsboro and the vicinity thereof, and for other municipal purposes and said Consumer is not permitted to and hereby agrees not to use, employ, consume or apply said electricity or electric power delivered, furnished or supplied hereunder, or any part thereof in place or places, or in any manner, or for any purpose or purposes, other than are provided for in this contract, and said Consumer is not permitted to and hereby agrees not to sell or deliver said electric power to any one Consumer in an amount in excess of 75 Horse Power.

Fifth. And said Power Company agrees that it will begin to deliver and supply said electric power herein contracted for, or
390 be ready, willing and able to do so on or before the 1st day of August, A. D., 1916. And said Consumer agrees that it will receive said electric power or be ready, willing and able to do so, on or before said date.

Sixth. It is expressly understood and agreed that in the event that said Consumer uses the said electric power or any part thereof, for pumping the water supply to be used for extinguishing a fire or fires, then the said Power Company shall not be liable to said Consumer, nor to any person, firm or corporation for any loss or injury of or to the property or persons by fire or fires, occasioned by or resulting directly or indirectly from the failure of the pump or pumping apparatus or appliances to operate, whether the said failure shall be due to the act or the said Power Company or otherwise,—it being the intention of the parties here that said Power Company shall not in any event be liable for loss or losses or damage occasioned by fire or fires which may be caused by or result from the failure of the said

Power Company to supply electric power to operate such or any pump or pumping apparatus and appliances.

Seventh. All of such electric power which shall be leased, sublet or otherwise disposed of by said Consumer to any other person or persons, corporation or corporations, shall be leased, sublet, or disposed of under a contract, each of which contracts shall be subject to this contract.

Eighth. Neither party hereto shall be responsible for accident or injury or damage to the machinery, apparatus, appliances or other property of the one caused by lightning, defects in or a failure of the machinery, apparatus or appliances of the other; and it is expressly understood and agreed that the said Power Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for, and that said Power Company shall not be in any way responsible for the transmission or control of said electric power or current beyond such point of its delivery to said Consumer, and shall not in any event, be liable for damages or injury to any person or property whatsoever arising, accruing or resulting from in
391 any manner, the receiving, use, consumption, application or distribution by said Consumer of said electric power. And said Consumer shall hold and save harmless the Power Company from any and all liabilities or liability to any person or property, incurred or sustained by the Power Company by reason of any negligence or misconduct on the part of the said Consumer, its officers, agents, servants or employees.

Ninth. The furnishing, supplying and delivering by said Power Company of said electric power, and the receiving, use, consumption and application thereof, and payment therefor by said Consumer is and shall be subject to and in accordance with the following rules and regulations, which shall be deemed and taken to be and are hereby made a part of this contract, to-wit:

(A) For the purpose of ascertaining the amount of electric power being supplied under this contract, the Power Company may place and install upon the said premises of the Consumer and connect in circuit at the terminale of its power lines (said terminale to be established as hereinbefore provided for), such watt-meter or meters as in the opinion of the said Power Company may or shall be necessary to measure and record the said electric power being supplied under this contract. All measuring instruments shall be of a good made and type, and shall be tested in the presence of representatives of both, parties, at any time, upon the written request of either party to the other. If, as a result of such test any instrument shall be found to be inaccurate, it shall be rendered to a condition of accuracy satisfactory to the representative of both parties, or a new instrument or instruments calibrated to the satisfaction of such representatives, shall be substituted. If the inaccuracy of any instrument shall exceed two (2%) per cent., then the readings of such instrument previously taken shall be corrected on the basis of such test, but not for more than thirty days prior to the date of test, nor prior to a date within thirty days on which such meters may have

proven accurate within two (2%) per cent. And it is further understood and agreed that said meter or meters may be read by the Power Company as often as either party hereto may deem
392 advisable. It is understood and agreed that in the computation of power measured, seven hundred and forty-six (746) watts shall constitute one horse power within the meaning of the terms as used in this contract.

(B) The said Power Company shall provide a regular and uninterrupted power service, and the said Consumer will regularly and continuously receive, use and apply the same in such manner as it may be needed, not exceeding the maximum amount named, and such additional power as may be taken as hereinbefore provided for; but in case the said Power Company shall be wholly or partially prevented from delivering, furnishing or supplying said electric power hereunder, or in case the service thereof shall be interrupted or suspended or fail, or in case said Consumer shall be prevented from receiving, using, consuming and applying said electric power by reason of or through strike, stoppage in labor, riot, fire, flood, ice, invasion, *viva* war, commotion, insurrection, military or usurped power, accident, order of any court or judge granted in any bona fide adverse legal proceeding or action, or any order of any civil authority, explosion, act of God or of the public enemies, or any cause reasonably beyond its control and not attributable to its neglect, then and in such event said Power Company shall not be obligated to deliver, furnish or supply said electric power hereunder during such period and shall not be liable for any damage or loss resulting from such interruption, prevention, suspension, or failure, and said Consumer shall not be obligated or liable to pay for such power not delivered, furnished or supplied during such period; and in any and all such event or events, the parties suffering such interruption, prevention, suspension or failure shall be prompt and diligent in removing and overcoming such cause or causes thereof; provided, however, that either party whose plant or system shall suspend operation by reason of accident to its machinery, plant or system, shall proceed at once to repair the same within a reasonable time, failing so to do the limit of or exemption from liability as fixed in this paragraph shall not apply and the party so failing shall be liable to the other as though no such limit or exemption had been fixed.

393 (C) The Power Company shall at all times during the continuance of this contract have the right of ingress to and egress from the premises of said Consumer for any and all purposes connected with the delivery, furnishing or supplying of electric power under this contract, or the exercise of any and all rights secured to or the performance of any and all obligations imposed upon it by this contract, during the term of this contract.

(B) If default shall be made at any time by said Consumer in paying for electric power delivered, furnished or supplied to it by the Power Company under and pursuant to the terms of this contract, and if such default shall continue for a period of thirty days, then the Power Company shall have the right at its option to

terminate this contract, or, at its option, without terminating or in anywise avoiding this contract, to discontinue, suspend and withdraw the delivery, furnishing or supplying electric power hereunder, until payment of all money due to it under the terms hereof from the Consumer shall have been made; and this option may be exercised by the Power Company whenever, and as often as, any such default shall occur and continue for such period of thirty days, and delay or omission on the part of the Power Company to exercise such option whenever such default on the part of the said Consumer shall occur at any time, shall not be deemed a waiver by the Power Company of its rights to exercise such option whenever at any subsequent time such default on the part of the Consumer shall occur. And in the event of such default in the payment or at the terminating of or expiration of this contract, then it shall be lawful for, and the said Consumer does hereby authorize and empower the Power Company, its successors and assigns, officers, agents or employees, with the aid and assistance of any person or persons to enter in and upon the said premises of the Consumer, and such other place or places whatsoever as or in which any meter, apparatus, appliance, fixtures or other property of said Power Company is, or may be, and remove, take and carry away same.

(E) Said Consumer agrees that should it use said power for lighting the streets and public places of the Town of Hillsboro, 394 or sell the same to the inhabitants of the said Town of Hillsboro or the vicinity thereof for lighting purposes that it will install and maintain proper regulating and controlling devices.

(F) No change in, modification, alteration or enlargement of this contract shall be valid or binding unless endorsed hereon in writing at the time the same is made, and signed by the parties hereto.

(G) This contract is not binding upon the Power Company until ratified and approved by the Board of Directors of said Company.

(H) It is mutually understood and agreed that no claims or demands which the Consumer may have against the Power Company shall be set off or counter-claimed against the payment of any bill for electric power furnished hereunder, and all bills shall be paid as herein provided, regardless of such claims or demands.

In witness whereof, on the day and year first above written, the said parties hereto have hereunto caused this agreement to be signed in duplicate, and caused their respective corporate names to be subscribed, and their corporate seals to be affixed hereto by their respective Secretaries or Assistant Secretaries, duly authorized by resolution duly adopted by their respective Board of Directors. Southern Power Company, by B. N. Duke, Vice-President. Attest: N. 395 C. Parker, Secretary. Hillsboro Power & Light Co., by H. S. Cates, President. Attest: A. H. Graham, Secretary. (Corporate Seal, Southern Power Co.)

Defendant's Exhibit No. 40.*Agreement Between Southern Power Co. and Hillsboro Power & Light Co., Dated May 8, 1917.*

Memorandum of agreement, Made and entered into this 8th day of May, A. D. 1917, by and between Southern Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the first part, hereinafter designated as and called the "Power Company," and Hillsboro Power & Light Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, party of the second part, hereinafter designated as and called the "Consumer," witnesseth:

That, whereas, the parties hereto did, on or about the 12th day of April, A. D. 1916, make and enter into a certain contract dated on that day, wherein the Power Company agreed to furnish certain electric power to the Consumer, and wherein the Consumer agreed to pay the Power Company for power used by it as therein set forth in reference to which contract is hereby had:

Now, therefore, In consideration of the mutual covenants and agreements hereinafter contained, the expected performance thereof of the electric power to be delivered, the sums of money to be paid, and other valuable considerations, the parties hereto, for themselves, their successors and assigns, have mutually agreed and do agree with each other that the said contract be, and the same hereby is amended as follows:

That if any customer of the Consumer shall in any one
396 month consume 5,000 Kilowatt Hours and over of said electric power, then the Consumer shall pay the Power Company for such power so consumed by customers using 5,000 Kilowatt Hours and over of said electric power in said month at the rate of one and one-tenth (1.1c.) cents per Kilowatt Hour; provided, however, that in order to avail itself of and receive the benefit of the reduced rate allowed herein for the power consumed as herein set forth, the Consumer shall submit to the Power Company for its approval, copies of contracts with its customers using 5,000 Kilowatt Hours and over of said electric power, as aforesaid, which contracts or contracts shall be for a period or periods expiring not later than the date of the expiration of said contract dated the 12th day of April, 1916, and shall furnish to the Power Company a statement on or before the tenth day of the month succeeding that in which such power was delivered, showing the meter readings of customers using the amount or amounts of power above set forth; and the Power Company shall in addition thereto, have the right and privilege to inspect and examine books and records of the Consumer for the purpose of verifying the said statement.

This agreement shall become effective on and after the 1st day of June, 1917.

In witness whereof, on the day and year first above written, the said parties hereto have hereunto caused this agreement to be signed, in duplicate, and caused their respective corporate names to be subscribed, and their corporate seals to be affixed hereto by their respective Presidents or Vice-Presidents, and attested by their respective Secretaries or Assistant Secretaries, duly authorized by resolution duly adopted by their respective Boards of Directors. Southern Power Company. W. Gill Wylie, Vice-President. Attest: N. C. Parker, Secretary. (Seal.) Hillsboro Power & Light Company, by H. S. Cates, Vice-President. Attest: A. H. Graham, Secretary. (Seal.)

397

"Defendant's Exhibit No. 41."

Agreement Between Southern Power Co. and Norwood Power and Light Co., Dated Nov. 1, 1919.

Memorandum of agreement, Made and entered into this first day of November A. D., 1919, by and between Southern Power Company, a corporation organized and existing under and by the virtue of the laws of the State of New Jersey, party of the first part, hereinafter designated as and called the "Power Company," and Norwood Power and Light Company, a corporation organized and existing under and by virtue of the laws of the State of North Carolina, party of the second part, hereinafter designated as and called the "Consumer," witnesseth:

That whereas the parties hereto did, on or about the 1st day of May 1916, make and enter into a power contract, dated on that day, for the furnishing of electric power to the Consumer to an amount not exceeding fifty (50) horsepower for the purposes and upon the terms and conditions therein set forth, reference to which contracts is hereby had; and,

Whereas the parties hereto did, on or about the 23rd day of May 1916, make and enter into a Supplemental Contract dated on that day, wherein it was agreed that the Consumer should pay to the Power Company one and one-tenth cents (1.100c.) per kilowatt hour for electric power furnished Consumer's Customers, using five thousand (5,000) kilowatt hours and over of said electric power per month as therein set forth, reference to which Supplemental Contract is hereby had; and

Whereas, on account of the increasing requirements of its customers, the Consumer is desirous of purchasing from the Power Company, additional electric power; and,

398 Whereas the parties hereto have agreed that said power contract, tated May 1, 1916 as aforesaid, be amended ad hereinafter stated; and that said supplemental contract, dated May 23, 1916 as aforesaid, shall apply only to such customers of the Consumer as are now using five thousand (5,000) kilowatt hours and over of electric power per month:

Now, therefore, in consideration of the premises, the electric power to be delivered, the sums of money to be paid and other valuable considerations, the parties hereto, for themselves, their successors and assigns, have mutually agreed, and do agree, with each other as follows:

First. That during the continuance of said power contract, between the parties hereto dated May 1, 1916 as aforesaid, from and after November 1st, 1919, the maximum amount of electric power, which the Power Company shall, or can be required to deliver, or supply, to the Consumer, under said contract, is, and shall be, one hundred (100) kilowatts.

Second. The Consumer agrees to pay the Power Company, for any and all of said electric power received and used by it, at the following scale of rates, based on monthly consumption, to wit:

0 to	100 K. W.	Hrs.	9c.	per Kilowatt Hour.
100	150	" "	8c.	" " "
150	200	" "	7c.	" " "
200	300	" "	6c.	" " "
300	400	" "	5c.	" " "
400	500	" "	4c.	" " "
500	1,000	" "	3.5c.	" " "
1,000	2,000	" "	3.0c.	" " "
2,000	4,000	" "	2.6c.	" " "
4,000	8,000	" "	2.2c.	" " "
8,000	16,000	" "	1.9c.	" " "
16,000	26,000	" "	1.7c.	" " "

If the monthly consumption be between 26,000 and 32,000 kilowatt hours, the Consumer shall pay, to the Power Company, for 24,000 kilowatt hours of said electric power at the rate of 1.7c. per kilowatt hour; and shall pay, for all electric power in excess of 26,000 kilowatt hours to and including 32,000 kilowatt hours at the rate of 1.8c. per kilowatt hour.

399

32,000 to	50,000 K. W.	Hrs.	1.6c.	per Kilowatt Hour.
50,000	" 100,000	" "	1.55c.	" " "
100,000	" 200,000	" "	1.5c.	" " "
200,000	" 400,000	" "	1.4c.	" " "
400,000	" 500,000	" "	1.3c.	" " "
All over	500,000	" "	1.2c.	" " "

The Consumer further agrees that it will pay to the Power Company, as a minimum charge, the sum of One Hundred Dollars (\$100.00) per month, whether it shall use electric power equal in value to that amount or not; and it is agreed that the amount of electric power, delivered hereunder, in excess of said minimum charge shall be charged for in the manner and at the rate herein provided.

Third. That said contract, dated May 1, 1916, as aforesaid, except as herein expressly amended, shall, in all respects, continue in

full force and effect until the expiration, or other termination, thereof.

Fourth. It is further understood and agreed that said supplemental contract, between the parties hereto, dated May 23, 1916, as aforesaid, shall apply only to the costomers of the Consumer now using five thousand (5,000) kilowatt hours and over of electric power per month; and that from and after the date hereof, as to new customers of the Consumer, said supplemental contract, dated as aforesaid, shall be of no force and effect.

In witness whereof, on the day and year first above written, the said parties hereto have hereunto caused this agreement to be signed in duplicate, and caused their respective corporate names to be subscribed, and their corporate seals to be affixed hereto by their respective Presidents or Vice-Presidents, and attested by their respective Secretaries or Assistant Secretaries, duly authorized by resolutions duly adopted by their respective Boards of Directors. Southern Power Company. W. Gill Wyle, Vice-President. At-
400 test: N. C. Parker, Secretary. (Seal.) Norwood Power
and Light Company. J. F. Shin, President. Attest: Chas.
E. Barker, Secretary. (Seal.)

Defendant's Exhibit No. 42.

Agreement Between Southern Power Co. and Piedmont Ry. & Electric Co., Dated Dec. 31, 1915.

STATE OF NORTH CAROLINA,
County of Mecklenburg:

This agreement Made and entered into, this 31st day of December A. D., 1915, by and between Southern Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the first part, hereinafter designated as and called the "Power Company," and Piedmont Railway & Electric Company, a corporation organized and existing under and by virtue of the laws of the State of North Carolina, party of the second part, hereinafter designated as and called the "Consumer," witnesseth:

That in consideration of the mutual covenants and agreements hereinafter contained, the expected performance thereof, the electric power to be delivered, the sums of money to be paid and other valuable considerations, the parties hereto, for themselves, their successors and assigns, have mutually agreed and do agree with each other as follows:

First. The said Power Company agrees that it will deliver to said Consumer electric power and the said Consumer hereby agrees to receive, use, and pay for said electric power at the time and
401 place or places, and for the purposes and in the amounts and in the manner, and in accordance with the terms, limitations and conditions hereinafter set forth, for and during the term hereof, which is and shall be the term of ten (10) years from and

after the day or date on which the delivering of said electric power hereunder is and shall be actually begun.

Second. The classes of electric power to be delivered hereunder are those known and designated as "Primary Power," and "Secondary Power." By Primary Power is meant the power which shall be delivered hereunder twenty-four hours per day each and every day of the week; by Secondary Power is meant power as to which the said Power Company hereby reserves to itself the right to cut off or discontinue, to turn back on or to resume the delivery thereof in accordance with the terms and conditions hereinafter set forth, said Secondary Power being that in excess of the Power required, reserved, sold, delivered, furnished or supplied by said Power Company as Primary Power.

Third. The Power Company agrees to sell and deliver, and the Consumer agrees to receive and pay for in accordance with the terms of this contract, 900,000 Kilowatt Hours of Primary Power at the rate of 75,000 Kilowatt Hours per month, during each and every year of the term of this contract, provided, that the Consumer shall at no time use said power in excess of 400 Kilowatts. The Consumer may, however, without at any time exceeding 400 Kilowatts, at its option take either 75,000 Kilowatt Hours per month during each and every month for the term of this contract or it may take and consume up to but not exceeding 100,000 Kilowatt Hours per month until it shall have taken and consumed the said amount of 900,000 Kilowatt Hours of Primary Power per year. It being distinctly understood and agreed, however, that the Consumer shall at no time take and consume more than 400 Kilowatts of Primary Power.

Fourth. The Power Company agrees that it will sell and deliver, and the Consumer agrees that it will receive and pay for in accordance with the terms and conditions of this contract, Secondary Power as herein provided, in an amount of amounts not at any time exceeding 1,500 Kilowatts and the Consumer agrees that by the end of the first six months of the term of this contract it will receive, or be ready and willing so to do, 120,000 Kilowatt Hours per month, and by the end of the second six months of the term of this contract it will receive, or be ready and willing so to do, 240,000 Kilowatt Hours per month, and by the end of the third six months of the term of this contract it will receive, or be ready and willing so to do, 360,000 Kilowatt Hours per month. At the expiration of the third six months' period, aforesaid, or at the expiration of eighteen months after the beginning of service under this contract the Consumer will pay for at the rate herein named 216,000 Kilowatt Hours of Secondary Power during each succeeding month of the term of this contract, whether it shall have actually used said amount or not; provided, however, that the Power Company shall not have voluntarily during such month suspended the delivery of Secondary Power as herein provided; Provided, further, that nothing in this paragraph shall affect the obligation on the part of the Consumer to take and pay for at least 75

000 Kilowatt Hours of Primary Power during each and every month of the term of this contract.

Fifth. The Consumer is installing at the said point of delivery of power hereunder, a transformer station with the capacity of 3,000 K. V. A. and the Power Company agrees that should the requirements of the Consumer at any time during the life of this contract exceed the amounts of Primary Power and Secondary Power set forth in paragraphs three and four of this contract, that it will make and enter into a supplementary contract, for the remainder of the term of this contract, with the Consumer wherein the Power Company will agree to sell and the Consumer will agree to purchase and pay for at the rates herein named, and under the same terms and conditions set forth herein, such additional Primary Power and Secondary Power as the Consumer may require to meet its increased consumption not exceeding in the aggregate, including this contract, 3,000 K. V. A., provided, however, that said
403 consumer shall at such time, be entitled to receive Secondary Power for such increased amount or amounts under the present existing rules, regulations and conditions of the Power Company, governing the sale and supplying of Secondary Electric Power, and provided, further, that the Consumer shall agree in said contract to take amounts of Primary Power and Secondary Power covering such increased demand which shall bear the same proportion to each other as the amount of Primary Power set forth in the third paragraph of this contract bears to the amount of Secondary Power set forth in the fourth paragraph of this contract.

Sixth. All electric power delivered hereunder shall be three phase alternating at approximately sixty cycles per second periodicity and at a voltage to be determined upon by said Power Company, and at approximately 100,000 volts; and said electric power shall be delivered by said Power Company to said Consumer at a terminal or delivery point located and situated in the State of North Carolina, County of Alamance, at or near Burlington and more particularly located and established as follows, to-wit: Said terminal, the delivery point of power hereunder, shall comply with the rules and regulations hereinafter set forth and shall be at or near the outside walls of the Consumer's Substation to be located at or near Burlington, and all meters used for measuring power hereunder shall be in accordance with the rules and regulations hereof and located on the high tension side of Consumer's transformers.

Seventh. Said Power Company agrees that it will begin to deliver said electric power herein contracted for, or be ready, willing and able so to do, on or before the 1st day of January 1916, and the Consumer agrees to be ready, willing and able so to do, and to receive and use said electric power on or before said date. And each party hereto hereby agrees to notify the other party as soon as such party is ready, willing and able to perform its agreement in this paragraph contained. And in case either party hereto should be delayed in or prevented from performing or carrying out the agreements, covenants and obligations made by and imposed upon said

parties, or either of them, by this paragraph by reason of or
 404 through strike, stoppage of labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any Court or Judge granted in any bona fide adverse legal proceedings or action, order of any civil authority, explosion, act of God or the public enemies, or any cause reasonably beyond its control and not attributable to its neglect, then and in such case or cases such period of delay or prevention shall not be reckoned or accounted as a part of the time within which such party was to perform and carry out the same, and the days, dates, times and periods mentioned in this paragraph, shall be extended for a period proportionate to such delay or prevention, provided, however, that the party or parties suffering such delay or prevention shall use all reasonable diligence to remove the cause or causes thereof, and either party shall give to the other written notice for such extension.

Eighth. The electric power to be delivered hereunder is sold to the Consumer for the purpose of its being used for the operation of its own plant or for resale to others; provided, however, that should the Consumer use or sell the same to any other person or corporation for the purpose of lighting, that it will install proper transforming, regulating and controlling devices in connection therewith.

Ninth. The Consumer agrees that it will pay the Power Company for any and all of said electric power at the following scale of rates, to-wit:

For the 1st 150,000 Kw. Hrs. per month, Primary Power, 9c per Kw. Hr.

For the next 50,000 Kw. Hrs. per month, Primary Power, 85c per Kw. Hr.

For all over 200,000 Kw. Hrs. per month, Primary Power, .8c per Kw. Hr.

For the 1st 150,000 Kw. Hrs. per month, Secondary Power .5c per Kw. Hr.

For the next 50,000 Kw. Hrs. per month, Secondary Power 49c per Kw. Hr.

405 For all over 200,000 Kw. Hrs. per month, Secondary Power, 48c per Kw. Hr.

and said payment shall be made at the office of the Power Company located in Charlotte, North Carolina. Bills shall be rendered each month by said Power Company to said Consumer for the delivery of said electric power hereunder, during the preceding month, and each and every and all of such bills shall be payable by said Consumer monthly, in lawful money or by checks which shall be receivable by Charlotte, (N. C.) banks at par, and the payments thereof and all payments under this contract shall be made at said office of said Power Company on or before the fifteenth day of each and every month immediately succeeding or following that

month in which the said electric power shall have been delivered, during the full term of this contract.

Tenth. The Power Company hereby agrees and guarantees that it will deliver the Secondary electric power hereunder to said Consumer for a time or period aggregating at least, but not exceeding eighteen months during each and every period of three continuous calender years while this contract is in force; provided, however, that said Power Company may, if it so desires, deliver such electric power for a greater number of months in such three years than the number of months last named; and provided, further that the actual time or times of the delivery of such power hereunder by said Power Company shall be and the same is in the discretion of said Power Company, and such delivery of said electric power hereunder may, but need not, be continuous for such number of months heretofore mentioned in this contract, but, on the contrary, said Power Company hereby expressly reserves the right to select the time or times during each and every year during this contract when it will deliver said electric power, and reserves the right at any time or times and as often as said Power Company may deem it advisable or see fit so to do, to shut down or discontinue the delivery of power hereunder, after twelve hours' notice to said Consumer; and said Power Company may likewise at any time or times and as often as said

406 Power Company may deem it advisable or see fit so to do, resume the delivering of said electric power hereunder upon a like notice of twelve hours to said Consumer, and said Consumer agrees and guarantees that it will, upon twelve hours' notice given by the Power Company, discontinue the use of said secondary power and will likewise, upon twelve hours' notice from said Power Company, resume the use of said secondary power. Said clause requiring twelve hours' notice to said Consumer to discontinue the use or to resume the use of said electric power shall apply to discontinuances, shut downs, and resumptions under this paragraph hereof only, and does not and shall not apply in the case of any prevention, suspension, or failure or interruption due to causes or circumstances elsewhere in this contract referred to and provided for.

Eleventh. The Power Company shall install at the said delivery points and connect in the power circuit such wattmeter or meters as shall be necessary to measure and record the amount of said electric power delivered. Said meters shall belong to and be kept in good repair by the Power Company, and shall be at all times upon the written request of the Consumer, subject to such standard test as may be necessary to establish their commercial accuracy. The Consumer shall under no circumstances interfere with said meters, but in case of defective service shall immediately give notice thereof to the Power Company. If said tests show that the meters or any of their transformers, wiring or connections have been damaged and that because of such damage the meters are not commercially accurate, then and in that case, said meters shall be restored to a condition of accuracy satisfactory to the representatives of both parties.

If the inaccuracy of any instrument shall exceed two (2%) per cent then the readings of such instrument previously taken shall be corrected on the basis of such test, but not for more than thirty days prior to the date of the test, nor prior to a date within such thirty days on which such meters may have been accurate within two (2%) per cent.

Twelfth. The Power Company shall, at its own cost and expense, extend its power lines to the said terminal or deliver- points, and for that purpose said Consumer, in the event that said terminals
407 or delivery points are on its premises, hereby gives and grants to the Power Company for the life of this contract, such rights of way and incidental privileges, over its premises as may be necessary to erect and maintain said power lines and terminals; provided that said rights of way shall follow as nearly as possible a direct line from the point where they shall enter the premises of the Consumer to said terminal points as aforesaid. The mains of the Consumer shall connect to and with the mains of the Power Company at the terminals or said delivery points. The Power Company shall make said connections and maintain the same in proper condition, furnishing and placing in proper locations all appliances necessary for this purpose, which appliances shall be and remain the property of and shall be maintained and kept in repair by the said Power Company.

Thirteenth. The Power Company shall regularly and continuously deliver, and the Consumer shall regularly and continuously receive and use said electric power as required for the aforesaid purposes. But should either of said parties by reason of or through strike, stoppage of labor, lightning, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any Court or Judge granted in any adverse legal proceeding or action, order of any civil authority explosion, act of God or the public enemy, or any causes reasonably beyond its control and not attributable to its neglect, be wholly or partially prevented from or interrupted in performing this contract, then and in such event, the Power Company shall not be obligated to deliver or the Consumer to receive said electric power to the extent so prevented or interrupted, and neither party shall be liable for any damage or loss resulting to the other party from such prevention or interruption; provided, however, that in any and all such event or events, the party suffering such prevention or interruption shall be prompt and diligent in its efforts to remove and overcome the cause or causes thereof, and should either party suspend operations by reason of accident or injury to its machinery, plant or system, and the same be not repaired within a reasonable time, the limitation of or exemption from liability in this paragraph contained shall not ap-
408 ply and the party failing to so repair shall be liable to the other as though such limitation or exemption had not been expressed.

Fourteenth. Each of said parties shall be solely responsible for any accident or injury occurring to or caused by its machinery, ap-

paratus, appliances or other property or the operation thereof, or in or through its transmission, use or control of said electric power; and the Consumer undertakes and covenants to indemnify and save harmless the Power Company from all loss, cost or damage sustained by or received from the latter by reason of an accident or injury for which the former is hereby made solely responsible; and the Power Company undertakes and covenants to indemnify and save harmless the Consumer from all loss, cost or damage sustained by or recovered from the latter by reason of an accident or injury for which the former is hereby made solely responsible.

Fifteenth. The Power Company shall have the right to interrupt the delivery of power hereunder to make necessary repairs or alterations, and the parties hereto shall co-operate with each other so that said repairs or alterations may be made with the least possible inconvenience to the parties hereto.

Sixteenth. Should the Consumer fail to pay any bill for said electric power rendered by the Power Company within thirty (30) days from the receipt thereof, unless because of a dispute in good faith as to the correctness thereof, then the Power Company shall have the right at its option to discontinue the delivery of electric power until payment of all money due to it under the terms hereof by the Consumer shall have been made; and this option may be exercised by the Power Company whenever, and as often as, any such default shall occur and continue for said period of thirty (30) days and delay or omission on the part of the Power Company to exercise such option at any time, shall not be deemed a waiver by it of its right to exercise such option whenever such default on the part of the Consumer shall occur or continue.

409 Seventeenth. No claim or demand which the Consumer may have against the Power Company shall be set off or counterclaimed against the payment of any bill for electric power furnished hereunder, and all bills shall be paid as herein provided, regardless of such claim or demand.

Eighteenth. No alteration of or addition to this contract except as hereinbefore stated, shall be valid or binding unless in writing duly authorized and executed by both of the parties hereto.

Nineteenth. The Consumer agrees to carefully read the meters installed by the Power Company at six o'clock A. M., and six o'clock P. M. each day, and the Consumer agrees to mail readings to said Power Company each day.

This contract shall not be binding or become obligatory upon the Power Company until ratified and approved by its Board of Directors.

In witness whereof, the said parties hereto have executed this agreement in duplicate by causing their respective corporate names to be subscribed and their respective corporate seals to be affixed hereto by officers duly authorized to do. Southern Power Company, by B. N. Duke, Vice-President. Attest: W. C. Parker, Secretary. (Seal.) Piedmont Railway & Electric Company, by J. H. Bridgers, President. Attest: James Mullen, Secretary. (Seal.)

Defendant's Exhibit No. 43.

Agreement Between Southern Power Co. and Piedmont Ry. & Electric Co., Dated May 31, 1917.

This agreement, made and entered into this 31st day of May A. D., 1917, by and between Southern Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the first party, hereinafter designated as and called the "Power Company," and Piedmont Railway & Electric Company, a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina, party of the second part, hereinafter designated as and called the "Consumer," Witnesseth:

Whereas the parties hereto did on or about the 31st day of December, A. D., 1915, make and enter into a contract dated on that day wherein and whereby the Power Company agreed to deliver to the Consumer certain electric power, and the Consumer agreed to receive, use and pay for the same in accordance with the terms, limitations and conditions therein set forth for and during the term of ten (10) years from and after the day or date on which the delivering of said electric power thereunder shall have been actually begun reference to which contract is hereby had, and

Whereas the Consumer is desirous of purchasing additional electric power from the Power Company, and whereas, the Power Company has no additional secondary power for sale, and whereas the Consumer has no adequate steam plant to supplant additional secondary power.

Now, therefore, in consideration of the premises and the mutual covenants and agreements hereafter contained, the expected performance thereof, the electric power to be delivered, the sums of money to be paid, and other valuable considerations, the parties hereto, for themselves, their successors and assigns, have mutually agreed and do agree with each other as follows:

411 First. The Power Company agrees that it will sell and deliver to the Consumer for and during the period of two months beginning April 27, 1917, one Hundred Fifty Thousand (150,000) kilowatt hours of primary power per month, and that it will sell and deliver to the Consumer for and during the period of one month beginning June 27, 1917, Two Hundred Thousand (200,000) Kilowatt hours of primary power, and that it will sell and deliver to the Consumer for and during the term or period beginning July 27, 1917 and ending at the expiration or other termination of said contract dated December 31, 1915, two Hundred Fifty Thousand (250,000) Kilowatt hours of primary power per month, and the Consumer agrees that it will receive and pay for said electric power at the rate provided for primary power in said contract dated December 31, 1915 and at the times therein set forth. Provided, however, it is expressly understood and agreed that the Consumer

shall not at any time receive and consume more than eleven hundred (1,100) kilowatts of said electric power.

Second. It is expressly understood and agreed that the electric power herein contracted for is and shall be in addition to the primary power furnished the Consumer by the Power Company under said contract dated December 31, 1915, and that said electric power shall be received and used by the Consumer for the purposes and in accordance with the rules, regulations and conditions, set forth in said contract dated December 31, 1915.

Third. It is further expressly agreed that the Power Company shall not be required to deliver to the Consumer secondary power in addition to the amounts set forth in Paragraph Fourth of said contract dated December 31, 1915, and the Consumer agrees that it will not use secondary power in excess of said amounts.

Fourth. The Power Company agrees that it will sell and deliver to the Consumer in lieu of the power herein contracted for, both primary power and secondary power, in addition to the amounts stated in said contract dated December 31, 1915, and in the 412 proportions therein set forth, when the plant known as the Wateree Station shall be put into full operation, and when the Consumer shall be in a position to receive same.

Fifth. This contract shall not be binding or become obligatory upon the Power Company until ratified and approved by its Board of Directors.

In witness whereof, the said parties hereto have executed this agreement in duplicate by causing their respective corporate names to be subscribed, and their respective seals to be affixed hereto by their officers duly authorized so to do. Southern Power Company, by W. Gill Wylie, Vice-President. Attest: W. C. Parker, Assistant Secretary. (Seal.) Piedmont Railway & Electric Co., by J. H. Bridgers, President. Attest: James Mullen, Secretary. (Seal.)

"Defendant's Exhibit No. 44."

Agreement Between Southern Power Co. and Piedmont and Northern Ry. Co., Dated July 1, 1914.

Memorandum of agreement, Made and entered into, this 1st day of July, 1914, by and between the Southern Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the first part, hereinafter called the "Power Company," and the Piedmont and Northern Railway Company, a corporation organized under the laws of the State of South Carolina, party of the second part, hereinafter called the "Railway," witnesseth:

413 In consideration of the mutual covenants and agreements hereinafter contained, the expected performance thereof, the electric power to be delivered, the sums of money to be paid, and other valuable considerations, the parties hereto for themselves, their successors and assigns, have mutually agreed and do agree with each other as follows:

I. The Power Company agrees that it will sell and deliver to the Railway certain electric power and the Railway agrees to receive, use and pay for the same at the time and places and for the purposes and in the amounts and in the manner and in accordance with the terms, limitations and conditions hereinafter set forth, for the term of twenty (20) years from the 1st day of July, 1914.

II. The class of power to be delivered hereunder is that known and designated as Primary Power and shall be delivered hereunder twenty-four (24) hours per day, each and every day of the week; provided however, that the Power Company shall have the right to interrupt the delivery of power hereunder on Sundays in order to make such repairs and alterations as it may deem necessary or advisable, so that it may properly maintain its lines and other apparatus, and the Railway shall co-operate with the Power Company to this end, so that said repairs or alterations may be made with the least possible inconvenience to the other parties hereto.

III. The electric power delivered hereunder shall be three phase, alternation at approximately sixty cycles per second periodicity, and at a voltage to be determined upon by the Power Company to the Railway at the terminal or delivery points located and situated at Greenville, S. C., near Greenwood, S. C., near Spartanburg, S. C., Gastonia, N. C., and Hoskins, N. C. And each and every point of delivery of power hereunder shall comply with the Rules and Regulations hereinafter set forth, and is more particularly located and established as follows, to-wit:

A. At the substation of the Power Company near the City of Greenville, where the wires of the Power Company shall connect with the wires of the Railway at the outside wall of the substation building of the Power Company. The voltage at this point of delivery to be approximately 2,300 volts. Meters at this point of delivery shall be located in the substation of the Power Company at Greenville, S. C.

B. At the junction point of the lines of the Power Company with the lines of the Railway at or near the City of Greenwood, S. C. The voltage at this point of delivery to be approximately 13,000 or 44,000 volts. Meters at this point of delivery to be located in the substation of the Power Company at Greenwood, S. C.

C. At the substation of the Power Company located near the City of Spartanburg, S. C. The voltage at this point of delivery to be approximately 2,300 volts. Meters at this point of delivery shall be located in the substation of the Power Company at or near Spartanburg, S. C.

D. At the substation of the Power Company located at Gastonia, N. C. The voltage at this point of delivery to be approximately 2,300 volts. Meters at this point of delivery shall be located in the substation of the Power Company at Gastonia, N. C.

E. At the substation of the Power Company located at Hoskins, N. C. The voltage at this point of delivery to be approximately 2,300 volts. Meters at this point of delivery shall be located in the substation of the Power Company at Hoskins, N. C.

IV. The Power Company agrees that it will sell and deliver and the Railway agrees that it will receive and use the electric power herein contracted for or so much thereof as it shall require from time to time for the operation of its railroad, including the lighting of its cars, stations and premises, as hereinafter set forth, and hereby agrees to pay the Power Company for all electric power delivered to the following rates, to-wit: One and Two-tenths (1.2c) Cents per Kilo Watt Hours for all power delivered hereunder between the hours of six A. M. and ten P. M., and six-tenths (.6) of a cent per Kilo Watt hours for all power delivered hereunder between the hours of ten P. M. and six A. M., and said payments shall be made at the office of the Power Company located in Charlotte, N. C. Bills shall be rendered each month by the Power Company to the Railway and each and every and all of said bills shall be payable monthly in lawful money or by checks which will be receivable by Charlotte (N. C.) Bank at par, and the payments thereof and all payments under this contract shall be made at said office on or before the 5th day of each and every month, immediately succeeding or following that month in which said electric power shall have been delivered.

V. The maximum amount of electric power which the Power Company shall or can be required to deliver under this contract shall be such an amount as the Railway shall require from time to time in the operation of it road, extending from Spartanburg, S. C., to Anderson, S. C., and Greenwood, S. C., and from Charlotte, N. C. to Gastonia, N. C., including the operation of its trains, locomotives, cars, lighting its premises, depots, warehouses and any and all other uses connected directly with the operation of an electric railway, but for no other purpose or purposes whatsoever, And the Railway shall not have the right and hereby agrees not to sell the power herein contracted for to any person, firm or corporation, not to assign this contract without the written consent of the Power Company first obtained, except to its bona fide successor, for the purpose — operating the lines of railway owned by the party of the second part.

VI. The Power herein contracted for shall be furnished subject to and in accordance with the following Rules and Regulations which have been hereinbefore referred to and which shall be deemed to be taken as and hereby made a part of this contract, to-wit:

(a) For the purpose of ascertaining the amount of electric power being supplied under this contract, the Power Company may place and install at the locations fixed by Paragraph Third hereof, and connect in the power circuit such watt meters or meters as in the opinion of said Power Company may or shall be necessary to measure and record the said electric power being supplied under this contract. Said meters shall be the property of said Power Company and shall be provided and installed and kept in good repair by said Power Company, and shall be at all times upon the written request of said Railway subject to such standard test as may be necessary to establish their commercial accuracy and said Railway shall, under no circumstances, interfere with said meter or meters,

but in case of defective or unsatisfactory service, said Railway shall immediately give written notice thereof to the said Power Company. In case of complaint on the part of the Railway, the test shall be made by the Power Company, but the Railway shall have the right to be represented at such time, and in case of disagreement, the two shall call in a third party to determine any matters of difference respecting the meter or meters under test.

(b) The mains of the Railway shall connect to and with the mains of the Power Company at the said terminal or delivery point, and said Power Company shall make said connections and place upon the said premises of the Railway all appliances necessary to make and maintain the same in proper condition; all appliances so furnished by the Power Company shall be and remain the property of and shall be maintained and kept in repair by the said Power Company. All wiring necessary to carry said power from said terminal points and distribute it to the lines, feeders, motors, machines, cars, and other apparatus through and to which it is to be applied, shall be done by the Railway at its own proper cost.

(c) The Power Company shall provide a regular and uninterrupted power service, and the Railway will regularly and continuously receive, and use the same, or as much thereof as it may be wholly or partially prevented from delivering said electric power hereunder, or in case the service thereof shall be interrupted or suspended or fail, or in case said Railway shall be prevented from receiving, using and applying said electric power by reason of or through strike, stoppage of labor, riot, fire, flood, ice, invasion, 417 civil war, commotion, insurrection, military or usurped power, accident, order of any court or judge granted in any bona fide adverse legal proceeding or action, or any order of any civil authority, explosion, act of God or of the public enemies, or any cause reasonably beyond its control and not attributable to its neglect, then and in such event, said Power Company shall not be obligated to deliver said electric power hereunder during such period and shall not be liable for any damage or loss resulting from interruption, prevention, suspension or failure, and said Railway shall not be obligated or liable to pay for such power not delivered, furnished or supplied during such period; and in any and all such event or events, the party suffering such interruption, prevention, suspension or failure shall be prompt and diligent in removing and overcoming such cause or causes thereof; provided, however, that either party whose plant shall suspend operation by reason of accident to its machinery, plant or system, shall proceed at once to repair the same within a reasonable time, and failing so to do, the limit of or exemption from liability as fixed in this paragraph shall not apply and the party so failing shall be liable to the other as though no such limit or exemption had been fixed.

(d) Neither party hereto shall be responsible for accident or injury to the machinery, apparatus, appliances or other property of the one caused by lightning, defects in or a failure of the machinery, apparatus or appliances of the other; and said Power Company shall

not be in any way responsible for the transmission or control of said electric power beyond the points of delivery to said Railway, and shall not, in any -vent, be liable for damages or injury to persons, property arising, accruing or resulting in any manner from the receiving, use or application by the said Railway of said electric power. And said Railway shall hold and save harmless the Power Company from any and all loss or damage sustained, and from any and all liability to any person or property, incurred by the Power Company by reason of any negligence or misconduct on the part of said Railway, its officers, agents or employees, in constructing, maintaining or operating its plant or machinery, apparatus or appliances used in connection therewith.

418 (e) The Power Company shall at all times during the continuance of this contract have the right of ingress to and egress from the premises of said Railway for any and all purposes connected with the delivery of electric power under this contract, or the exercise of any and all rights secured to it or the performance of any and all obligations imposed upon it by this contract.

(f) If default shall be made at any time by the Railway in paying for the electric power delivered to it by the Power Company under and pursuant to the terms of this contract, and if such default shall continue for a period of thirty (30) days, then the Power Company shall have the right at its option, to terminate this contract or at its option, without termination, or in any wise avoiding this contract, to discontinue, suspend and withdraw the delivery, furnishing or supplying electric power hereunder, until payment of all money due to it under the terms hereof from the Railway shall have been made; and this option may be exercised by the Power Company whenever and as often as any such default shall occur and continue for said period of thirty days, and delay or omission on the part of the Power Company to exercise such option at any time, shall not be deemed a waiver by it of its rights to exercise such option whenever such default on the part of the Railway shall occur. And said Railway shall pay to said Power Company all loss and damages resulting to it from such suspension of delivery of power hereunder. And in the event of such default in payment or at the termination or expiration of this contract, then it shall be lawful for and the said Railway does hereby authorize and empower the Power Company, its successors and assigns, officers, agents or employees, with the aid and assistance of any person or persons to enter in and upon the said premises of said Railway, and such other place or places whatsoever as or in which any meter, apparatus, appliances, fixtures or other property of said Power Company is, are or may be, and remove, take and carry away the same.

(g) No change in, modification, alteration or enlargement of this contract, shall be valid or binding unless endorsed hereon in writing at the time the same is made and signed by the President or Vice-President of both parties hereto.

419 (h) Said Railway agrees to maintain in good order and repair its electrical apparatus and appliances and to be prompt and diligent in

making repairs of accidental injury, and in case of defects existing in said apparatus and appliances which shall jeopardize the service of said Power Company, then and in that case, said Power Company shall have the right after giving written notice of such defects to said Railway, to shut down and discontinue the furnishing of said power until such defects shall have been repaired. Any delay or omission on the part of the Power Company to exercise such option shall not be deemed a waiver by it of its right to exercise such option whenever such default on the part of the Railway shall occur and said Railway shall pay to said Power Company all loss and damage resulting to it from such suspension.

(i) Said Railway agrees that should it use any part or all of said power delivered hereunder for lighting, it will install and maintain all necessary and proper regulating and controlling devices in connection therewith.

(j) It is mutually agreed that no claim or demand which the Railway may have against the Power Company shall be set off or counter-claimed against the payment of any bill for electric power furnished hereunder, and all bills shall be paid as herein provided, regardless of such claim or demand.

(k) This contract is not binding on said Power Company until ratified and approved by its Board of Directors.

In witness whereof, on the day and year first above written, the said parties hereto have hereunto caused this agreement to be signed in duplicate, and caused their respective corporate names to be subscribed and their corporate seals to be affixed hereto by their respective Secretaries or Assistant Secretaries, duly authorized
420 by resolutions duly adopted by their respective Boards of Directors. Southern Power Company, by W. Gill Wylie, Vice-President. Attest: W. C. Parker, Secretary. (Seal.) Piedmont & Northern Railway Co., by E. Thomason, Vice-President. Attest: N. A. Cooke, Secretary. (Seal.)

Defendant's Exhibit No. 45.

Agreement Between Southern Power Co. and Piedmont and Northern Ry. Co., Dated Jan. 1, 1916.

Memorandum of agreement, made and entered into this First day of January A. D. 1916, by and between Southern Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the first part, hereinafter called the "Power Company," and Piedmont and Northern Railway Company, a corporation organized and existing under the laws of the State of South Carolina, party of the second part:

Witnesseth: That whereas, the parties hereto did on or about the first day of July A. D. 1914, make and enter into a contract dated on that day, wherein the Power Company agreed to furnish and deliver to the Railway certain electric power, and wherein the Railway agreed to pay the Power Company for said power delivered to it

421 thereunder, which said contract was amended by supplemental contract entered into between said parties on or about the First day of January A. D. 1915, and dated on that day, reference to which said contract and supplemental contract is hereby made;

And whereas, the Power Company having made a general reduction in rates has consented to give the Railway the benefit thereof.

Now, therefore, in consideration of the premises and of the electric power to be delivered and the sums of money to be paid, the parties hereto for themselves, their successors and assigns, have mutually agreed and do agree with each other that said contract be and the same hereby is further amended as follows:

That from and after the date hereof, the Railway shall pay to the Power Company for all electric power delivered to it thereunder at the following rates, to-wit:

One (1c.) Cent per kilowatt hour for all power delivered between the hours of 6 A. M. and 6 P. M. and

Eight-tenths cent (0.8) per kilowatt hour for all power delivered thereunder between the hours of 6 P. M. and 6 A. M.

In witness whereof, on the day and year first above written, the said parties hereto have hereunto caused this agreement to be signed in duplicate, and caused their respective corporate names to be subscribed, and their corporate seals to be affixed hereto by their respective Presidents or Vice-Presidents, and attested by their respective Secretaries or Assistant Secretaries, duly authorized by resolutions duly adopted by their respective Boards of Directors. Southern Power Company, by W. Gill Wylie, Vice-President. Attest: W. C. Parker, Secretary. (Seal.) Piedmont & Northern Railway Co., by E. Thomason, Vice-President. Attest: N. A. Cocke, Secretary. (Seal.)

422

Defendant's Exhibit No. 46.

Agreement Between Southern Power Co. and Piedmont and Northern Ry. Co. Dated Jan. 1, 1915.

Memorandum of agreement, Made and entered into this First day of January, A. D. 1915, by and between Southern Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the first part, hereinafter called the "Power Company," and Piedmont and Northern Railway Company, a corporation organized and existing under the laws of the State of South Carolina, party of the second part, hereinafter called the "Railway,"

Witnesseth: That whereas, the parties hereto did on or about the First day of July A. D. 1914, make and enter into a contract dated on that day wherein the Power Company agreed to furnish and deliver to the Railway certain electric power, and wherein the Railway agreed to pay to the Power Company for said power delivered to it thereunder, as therein set forth, reference to which contract is hereby made;

And whereas, on account of the comparatively small quantity of night power used by the Railway, it has deemed it advisable to accept a flat rate of One (1c.) Cent per Kilowatt hour offered it by the Power Company.

Now, therefore in consideration of the premises and of the electric power to be delivered, the sums of money to be paid, the parties hereto for themselves, their successors and assigns, have mutually agreed and do agree with each other that said contract be and the same hereby is amended as follows:

That from and after the date hereof, the Railway shall pay to the Power Company for all electric power delivered thereunder at the rate of One (1c.) Cent per kilowatt hour.

In witness whereof, on the day and year first above written, the said parties hereto have hereunto caused this agreement to be signed in duplicate, and caused their respective corporate names to be subscribed, and their corporate seals to be affixed hereto by their respective Presidents or Vice-Presidents, and attested by their
 423 respective Secretaries or Assistant Secretaries, duly authorized by resolutions duly adopted by their respective Boards of Directors. Southern Power Company, by W. Gill Wylie, Vice-President. Attest: W. C. Parker, Secretary. (Seal.) Piedmont Northern Railway Co., by E. Thomason, Vice-President. Attest: N. A. Cocke, Secretary. (Seal.)

"Plaintiff's Exhibit A."

Letter from W. S. Lee to E. C. Deal, Dated June 22, 1919.

Southern Power Co.

Charlotte, N. C., June 22, 1909.

Mr. E. C. Deal, Manager, Greensboro, N. C.

DEAR SIR: I am in receipt of your favor of the 19th inst., regarding the sub-station for Greensboro.

It was our intention to build sub-station there similar to the one we were erecting at High Point, and according to copy of plans which I mailed you. I note that you wish to put your Rotary Converter and Motor Generator Set in this same building. While it would be possible to get this in the same size building, I do not think it advisable, especially as your Greensboro situation is going to grow very fast. I would, however, recommend that instead of building a 30 x 30 according to plans, that we enlarge it and make it say about 30 x 42'.

The building is laid out so that we can lengthen it to any length required. I do not know just what this additional length
 424 will cost, but it will be at a lower rate than the present building, and will not amount to a great deal.

If this will be satisfactory to you, please advise me and I will take the matter up and will advise you definitely as to just what the in

creased length would be, and just what the additional cost would be. Respectfully yours, W. S. Lee, 2nd V. P. & Chf. Engr. W. S. L./L. E.

"Plaintiff's Exhibit B."

Letter from Southern Power Co. to North Carolina Public Service Co., Dated Jan. 8, 1914.

Southern Power Co.

Charlotte, N. C., January 8, 1914.

Mr. C. H. Andrews, Manager North Carolina Public Service Company, Greensboro, N. C.

DEAR SIR: I beg to thank you for yours of January 7th, together with enclosures under separate cover of—

Prospective Electric Power Customers in and about Greensboro. Industrial Map of High Point.

Map of Greensboro, upon which factories not driven electrically and upon which your feeder system has been shown.

I thank you ver- mush indeed for this information, as it will aid materially in assisting us in estimating what possible load we will have to prepare for in our territory under this present development. Yours very truly, Southern Power Company. Chas. I. Burkholder, General Manager. C. I. B./H.

425

"Plaintiff's Exhibit C."

Letter from Southern Power Co. to N. C. Public Service Co., Dated Dec. 19, 1912.

Southern Power Co.

Charlotte, N. C., December 19, 1912.

Mr. C. H. Andrews, Manager North Carolina Public Service Co., Greensboro, N. C.

DEAR SIR: I thank you for yours of December 18th, in regard to size of meter necessary to take care of the additional power which you are to take for the Armour Fertilizer Company, and have to advise you that this matter has already been checked over and the meters are sufficient for this increased power. Yours very truly, Southern Power Company. Chas. I. Burkholder, General Manager. C. I. B./H.

"Plaintiff's Exhibit D."

*Letter from Southern Power Co. to N. C. Public Service Co., Dated
April 10, 1917.*

Southern Power Co.

Charlotte, N. C., April 10, 1917.

N. C. Public Service Co., Greensboro, N. C.

Attention Mr. C. H. Andrews.

MY DEAR SIR:

High Point Substation Circuits.

Referring to your letters of April 6th and 9th and my
426 letter of April 5th; kindly advise me if you are contemplating
any increase on this circuit, if so, what capacity, as we would
like to take care of the future as well as the present. Respectfully
yours, Southern Power Company. John W. Fosc, Engineer Mill
Power Dept. J. W. F./F. B.

"Plaintiff's Exhibit E."

*Letter from Southern Power Co. to Greensboro Electric Co., Dated
April 6, 1909.*

Southern Power Co.

Charlotte, N. C., April 6, 1909.

Greensboro Electric Co., Greensboro, N. C.

Attention of Mr. Hamilton.

DEAR SIR: I must apologize to you for not having returned your
map sooner but in some way have overlooked this.

Regarding the rate that we charge the Southern Railway Co. in
Charlotte for power, I would say that the rate is 5c. per K. W. Hr.

Kindly let me know as soon as you decide on the best rate you can
give the State Normal College so that I may be guided in closing up
the negotiations which we have with them.

Please accept best personal regards from the writer. Yours very
truly, Southern Power Company. Albert Milnow, Engineer Mill
Power Dept. A. M./B. H.

427

"Plaintiff's Exhibit F."

Letter from W. S. Lee to E. C. Deal, Dated Dec. 3, 1914.

Southern Power Co.

Charlotte, N. C., December 3, 1914.

Mr. E. C. Deal, Vice-President & Gen. Mgr. North Carolina Public Service Co., Greensboro, N. C.

DEAR SIR: Referring to our conversation regarding the matter of your furnishing power for the Southern Railway signal service north of Greensboro, N. C., will say that it is entirely satisfactory to us for you to handle this service. Respectfully yours, W. S. Lee, Vice-President. WSL/H.

Attached to said Exhibit is the following carbon copy:

Greensboro, N. C., November 27th, 1916.

Mr. Chas. R. Burkholder, Gen. Mgr. Southern Power Company, Charlotte, N. C.

DEAR SIR: The Southern Railway has written us that they are anxious to receive our former proposition relative to power service at Pomona. At your earliest convenience I would appreciate your decision relative to furnishing us 11,000 volts from the transmission lines connecting Pomona Mills with your steam station Greensboro. We would like to tap the line somewhere in the immediate neighborhood of the cotton mills. Yours very truly, N. C. Public Service Company. C. H. A., Manager. CHA/S.

428

"Plaintiff's Exhibit G."

Letter from Southern Power Co. to Pomona Terra Cotta Co., Dated Sept. 20, 1913

Southern Power Co.

Charlotte, N. C., Sept. 20, 1913.

Pomona Terra Cotta Company, Greensboro, N. C.

Attention Mr. W. C. Boron.

MY DEAR SIR: I discussed the matter of power for your Plant with Mr. Andrews of the Public Service Company, and his figures on the cost of line extension, etc., would not warrant him in going out to your Plant on a Lighting scheme only. I suggested to him the possibility that you would probably give me a 50 horse power load as an inducement to extend the line, and he seems to think that with that amount of business, it would be possible to get the appropriation necessary to spend in building the line.

My advice to you is to approach Mr. Andrews along this line offering him approximately 50 horse power to extend his lines out to your plant, and I think you can make a deal satisfactory to both sides.

This unquestionably is the best thing you can do, and I trust you and Mr. Andrews will get together. Yours very truly, Southern Power Company. Engineer Mill Power Dept. JWF/ALJ.

"Plaintiff's Exhibit H."

Letter from Southern Power Co. to E. C. Deal, Dated March 21, 1914.

Southern Power Co.

Charlotte, N. C., March 21, 1914.

Mr. E. C. Deal, North Carolina Public Service Co., Greensboro, N. C.

429 DEAR SIR: Referring to your inquiry of March 18th to Mr. Lee, in regard to whether or not we have had any negotiations with Mr. Smith, of the High Point Silk Mill, I have to advise you that we have never approached Mr. Smith. His mill being located within the City limits of High Point, we did not feel at liberty to enter into any negotiations with him at all.

If in handling this matter you should desire our assistance in any way, kindly command us, as we would like very much indeed to see Mr. Smith use electric power to operate his Mill. Yours very truly, Southern Power Company. Chas. I. Burkholder, General Manager. CIB/H.

"Plaintiff's Exhibit I."

Letter from Southern Power Co. to N. C. Public Service Co., Dated Dec. 1, 1916.

Southern Power Co.

Charlotte, N. C., Dec. 1, 1916.

North Carolina Public Service Co., Greensboro, N. C.

Attention Mr. C. H. Andrews, Mgr.

GENTLEMEN: Your letter of the 27th, to Mr. Burkholder, has been referred to me. We cannot furnish you with 11,000 volts from the "Pomona Mill line" as the line in question is not owned or maintained by our company, we can, however, deliver to you 11,000 volts at our steam plant.

We wish we could accede to your request, but the circumstances are as stated above. Yours very truly, Southern Power Company. John W. Fosc, Engineer Mill Power Dept. JWF/FB.

430

"Plaintiff's Exhibit J."

Letter from Southern Power Co. to E. C. Deal, Dated April 26, 1909.

Southern Power Co.

Charlotte, N. C., April 26, 1909.

Mr. E. C. Deal, Greensboro, N. C.

DEAR SIR: I take pleasure in enclosing you herewith the rates which I promised to send you. I think you understand the way we work out our lighting rates, but if not I would be pleased to reply to any questions which may suggest themselves.

Acknowledging your letter of the 23rd, I would request that you come to a decision regarding the College matter as soon as possible, since I am somewhat compromised with them in that I have not given them any answer to their requests for power.

The writer takes this opportunity of again extending his thanks for the pleasant day which was spent with you last week. Yours very truly, Southern Power Company. Albert Milnow, Engineer
Mill Power Dept. AM/BH.

"Plaintiff's Exhibit K."

Letter from W. S. Lee to Chas. B. Hole, Dated Dec. 11, 1917.

Southern Power Co.

Charlotte, N. C., December 11, 1917.

Mr. Chas. B. Hole, Pres. N. C. Public Service Co., Greensboro, N. C.

431 DEAR SIR: Referring to various conferences, beg to advise that the following improvements are made and being made on our system:

Improvements Made at Greensboro Substation.

A. The "switching bent" immediately adjacent to its substation, which contains the terminals of its high-tension transmission lines, have been entirely rebuilt and reinsulated, certain apparatus having been removed from the sub-station building.

B. Remote electric operation, direct from the sub-station switch-board, of its high tension switches located at "the switching bent" is being installed and only needs the receipt of a few small pieces of apparatus to be completed.

C. The connections between the Southern Power Company's 2,200 volt apparatus and the Public Service Company's transmission lines have been rebuilt and rearranged and a switch capable

of operating at ten times this voltage has been installed to take the place of the one injured by lightning.

D. Connections have also been provided for giving temporary service even if the new one should again be injured. We understand that you have made or will make arrangement for your lines to work with this.

Improvements Made at High Point Substation.

E. The 2,200 volt switchboard which supplies current for the North Carolina Public Service Company's transmission line has been rebuilt on a much heavier and larger scale.

General Improvements to Its Transmission System for Greensboro and High Point Service.

F. All insulators in the high tension "switching bent" between Great Falls and Durham have been replaced the past summer.

432 G. Two transmission lines have been reinsulated into Salisbury thus delivering current there from the Northwest (from the Lookout Shoals district). The current thus reaching Salisbury will be available for High Point & Greensboro 100,000 volt service and will be particularly useful when lightning storms south of Salisbury interfere with the main power-houses in South Carolina.

H. A new double circuit 100,000 volt line is being built from the South Carolina Plants to Charlotte, North Carolina. This will increase the supply of power in this district and also give an additional amount to be carried north, all the 50,000 volts lines remaining intact.

I. A large central switching plant is under construction. It has been laid out for an ultimate capacity of 750,000 K. W.; its structure will cover almost two acres and the switches for opening and closing the circuits will weigh 22 tons apiece. This will be an important feature in relieving lighting trouble as stated in H.

J. A large powerhouse and storage reservoir is being built at Bridgewater in which will be installed 25,000 K. W. This will be available for delivery of power from a separate direction from the South Carolina Plants.

I desire to state further that we shall be pleased to at all times cooperate with you for the betterment of our service or yours, and trust you will call on us from time to time if we can assist or cooperate with you in the matter. Respectfully yours, W. S. Lee, Vice-President. W. S. L./J.

"Plaintiff's Exhibit KK."*Prospectus of First Mortgage 5% Gold Bonds of Southern Power Co. of North and South Carolina.*

433 Southern Power Company, North Carolina & South Carolina, First Mortgage 5% Gold Bonds.

Dated March 1, 1910.

Due March 1, 1930.

Interest payable March 1 and September 1 in New York City. This issue is subject to redemption in its entirety, but not in part, on any coupon date at 105 and accrued interest. Coupon bonds with privilege of registration of principal. Bonds in denomination of \$1,000 each. The Farmers' Loan and Trust Company, New York, Trustee.

For further information regarding the above bonds, attention is called to the accompanying letter of Mr. W. S. Lee, Vice-President of the Company, from which it will be noted that:

The Southern Power Company provides with electric power and light the great Southern Cotton Mill District of North Carolina and South Carolina.

This issue is secured by a first and only mortgage upon modern electric power plants of approximately 162,000 H. P. rated capacity (44,000 H. P. under construction), of which 118,000 H. P. (30,000) H. P. under construction) is hydro-electric; and upon the Company's system of high tension transmission lines, its connecting and distributing substations and all appurtenances of an extensive and efficient electric power business.

The field of service embraces a population exceeding 950,000 and the Company's extensive system of transmission lines includes 1,520 miles of high tension circuits, which permits the operation of the several plants in a complete and unified system. Among the more important cities and towns in the field are Charlotte, Greensboro, Winston, Salisbury, Spartanburg and Greenville.

434 The present reproductive value of the physical property securing this mortgage, excluding intangible assets, exceeds twice the par value of the outstanding bonds, including those bonds shortly to be issued.

Earnings and Expenses of the Mortgaged Property as Officially Reported for the Year Ending April 30, 1915.

Gross Receipts	\$2,485,789.79
Operating Expenses (including Taxes & Rentals) ..	1,111,016.97
Net Earnings	\$1,374,772.82
Annual Bond Interest*	350,000.00
Balance	\$1,024,772.82

*Including interest on \$1,200,000 First 5's, shortly to be issued.

Net earnings approximately four times annual bond interest.
We recommend these bonds for investment.

Price on application. The National City Bank of New York.

Southern Power Company.

Charlotte, N. C., June 11, 1915.

The National City Bank of New York.

435 GENTLEMEN: In connection with your purchases of the Southern Power Company First Mortgage 5% Gold Bonds, due March 1, 1930, I submit the following information about the Company and its business.

Organization.

The Southern Power Company was incorporated in 1905. Its charter is unlimited in time and liberal in its terms. It grants broad rights which permit the Company to engage in the business of generating and distributing electrical energy, etc.

Capitalization.

Capital stock:	Authorized.	Outstanding.
Preferred, 7% Cumulative.....	\$6,000,000	\$6,000,000
Common	5,000,000	4,000,000
Total Stock.....		\$10,000,000
Funded debt:		
Southern Power Company, First Mortgage 5's, due March 1, 1930.....	\$10,000,000	\$7,000,000
Total Funded Debt.....		\$7,000,000*

The Catawba Power Company, whose entire \$700,000 Capital Stock is owned by the Southern Power Company, has outstanding the following bonds: 628,000 (mortgage now closed) Mortgage 6's, due June 1, 1933; \$6,000 Mortgage 6's, due August 1, 1922.

Neither the property nor the stock of the Catawba Power Company is covered by this mortgage—nor have the bonds of that Company any lien or interest in the property covered by this mortgage.

436 Earnings and Expenses of the Mortgaged Property as officially Reported for the Year Ending April 30, 1915.

Gross Receipts.....	\$2,485,789.79
Operating Expenses (including Taxes & Rentals)...	1,111,016.97
Net Earnings.....	\$1,374,772.82
Annual Bond Interest†.....	350,000.00
Balance	\$1,024,772.82

*Including \$1,200,000 First 5's, shortly to be issued.

†Including interest on \$1,200,000 First 5's, shortly to be issued.

The Net Earnings for the year ended April 30, 1915, were almost four times the interest requirements of the \$7,000,000 First Mortgage Bonds which will shortly be outstanding.

Business Field.

The Southern Power Company serves the great manufacturing and industrial territory extending for some 335 miles over the western section of South Carolina and central section of North Carolina. This section is commonly described as the Cotton Mill District of the South, including, as it does, over 420 mills with estimated equipment of 6,000,000 spindles and 125,000 looms.

The larger cities and towns of this district include: Durham, Burlington, Greensboro, High Point, Winston, Lexington, Salisbury, Statesville, Hickory, Newton, Shelby, Lincolnton, Gastonia, Concord, Charlotte, Monroe and Albemarle, in North Carolina and Gaffney, Spartanburg, Greenville, Easley, Greenwood, Newberry, Union, Chester, Rock Hill and Lancaster in South Carolina.

Many of the above-named towns are reached by the main line of the Southern Railway Company, and many parts of this territory are also served by the Seaboard Air Line Railway Company, Norfolk & Western Railway Company, Norfolk Southern Railroad, 437 Carolina & Northwestern Railway, Carolina, Clinchfield & Ohio Railway, Piedmont & Northern Railway Company, and the Atlantic Coast Line Railroad Company.

The urban population is estimated to be in excess of 260,000, and the total county population by the 1910 census was in excess of 952,000.

The growth of this industrial section has been very striking, and can be attributed primarily to the manufacturing advantages, due to the proximity of the raw material, availability of mill labor, adequate facilities for transportation, and a supply of dependable electric power at low prices. Furthermore, the climate is most favorable for industrial activities—with the result that the manufacture of cotton goods and cotton yarns has already been developed on a large scale and is still progressing.

There has been put into operation by the Piedmont & Northern Railway Company during the past fifteen months 125 miles of high speed electric railway. This road secures its power for operation from the Southern Power Company, and, in addition to frequent passenger service, operates complete freight service and interchanges with all standard steam railways.

The Company supplies power to more than 170 mills, which operate approximately 3,274,000 spindles and 71,000 looms. It also sells at wholesale electricity for commercial and municipal uses to the local distributing companies. The present opportunities in the Company's field of service are still very great, irrespective of the further industrial growth which is at present in evidence.

Physical Property.

The entire physical property which secures the present bond issue, including hydraulic developments distributing sub-stations, and transmission lines, is modern, and has been constructed in accordance with the most approved standards.

The bond issue covers the following by hydraulic developments; Great Falls, on the Catawba River, 32,000 H. P. rated capacity; Rocky Creek, on the Catawba River, 32,000 H. P. rated capacity;

438 Ninety-Nine Islands, on the Broad River, 24,000 H. P. rated capacity; Lookout, on the Catawba River, 30,000 H. P. rated capacity, under construction. The Company owns the following steam developments: Greensville Steam Station, 10,000 H. P., in operation; Eno Steam Station, 14,000 H. P., under construction; Greensboro Steam Station, 10,000 H. P., in operation; Mount Holly Steam Station, 10,000 H. P., in operation.

The high-tension transmission system of the Southern Power Company comprises a three-wire circuit equivalent to 1,520 miles in length, which permits the operation of the several power plants in a complete and unified system. The pole locations are secured under perpetual easement, excepting where on private right of way owned in fee.

The present reproductive value of the physical property securing this mortgage, excluding intangible assets, exceeds twice the par value of the outstanding bonds, including those bonds shortly to be issued.

Bond Issue.

This issue is secured by a first and only mortgage upon the hydro-electric developments mentioned above, aggregating 118,000 H. P., and steam developments, aggregating 44,000 H. P., rated capacity; and upon the Company's system of high-tension transmission lines; and its interconnecting and distributing sub-stations, and all appurtenances of an extensive and efficient electric power business.

The authorized First Mortgage Bond issue is \$10,000,000, of which \$7,000,000 will shortly have been issued and be outstanding. The remaining \$3,000,000 bonds in escrow may be issued only for 70% of the cash cost of additions and extensions to the property, but in no event unless the net earnings for the preceding twelve months shall have been equal to at least twice the annual interest on all First Mortgage Bonds outstanding, including those proposed to be issued. The entire issue of First Mortgage 5s (but no part thereof) may be called for payment on any interest date at 105 and accrued interest.

Rights.

439 The water power and sub-station sites are held in fee, and its pole locations are either owned, in fee or are secured under perpetual easements.

MAPS

TOO

LARGE

FOR

FILMING

e
a
a
a
p
w
T
7
ir
sl
F
is
m
in

Management.

The Company is owned and controlled by Messrs. J. B. Duke, B. N. Duke, W. G. Wylie, R. H. Wylie, W. S. Lee and associates. Yours very truly (Signed) W. S. Lee, Vice-President.

The property of the Company has been examined by experts, and the books and accounts duly audited by an expert accountant.

The legality of the mortgage, and all steps incident thereto, have been passed upon by L. C. Krauthoff, Esq., New York City.

The above information has been compiled from official statements and statistics. We do not guarantee, but believe it to be correct.

440 **Exhibit "L."**

Map of Transmission System of Southern Power Co., Charlotte, N. C.

(Here follows map, marked page 440.)

441 **"Plaintiff's Exhibit M."**

Primary Day Power Contract.

Parties.

Memorandum of agreement, Made and entered into this — day of —, 19—, by and between Southern Power Company, a corporation organized and existing under the laws of the State of New Jersey, party of the first part, hereinafter designated as and called the "Power Company," and —, a corporation organized and existing under the laws of the State of —, party of the second part, hereinafter designated as and called the "Consumer";

Witnesseth: That, in consideration of the mutual covenants and agreements hereinafter contained the expected performance thereof, the electric power to be delivered the sums of money to be paid and other valuable considerations, the parties hereto, for themselves, their successors and assigns, have mutually agreed and do agree with each other as follows:

Term.

First. The Power Company agrees that it will deliver to the Consumer electric power, and the Consumer hereby agrees to receive, use, and pay for said electric power, at the time and place or places, and for the purposes, and in the amounts, and in the manner, and in accordance with the terms, limitations, and conditions hereinafter set forth, for and during, and this contract shall continue in force for the term of — years from the date or day on which the delivering of the electric power hereunder is and shall be actually begun.

Class of Power and Location of Delivery Points and Meters.

Second. The class of electric power to be delivered hereunder is that known and designated as Primary Power by which is meant the power which shall be delivered hereunder, between the hours
442 of six a. m. and six p. m., every day of the week, Sundays excepted, and shall be three-phase, alternating, at approximately sixty cycles per second periodicity, and of a voltage to be determined upon by the Power Company at approximately — volts.

The electric power shall be delivered by the Power Company to the Consumer at a terminal or delivery point located and situated in the State of —, County of —, at —, and more particularly located and established as follows, to-wit: —. All meters used for measuring said electric power hereunder shall be located at —.

Date of Beginning.

Third. The Power Company agrees that it will begin to deliver the electric power herein contracted for, or be ready, willing, and able so to do, on or before the — day of —, 19—, and the Consumer agrees to receive and use said electric power or be ready, willing and able so to do, on or before said date. And each party hereto hereby agrees to notify the other party as soon as such party is ready, willing, and able perform its agreement in this paragraph contained. And in case either party hereto should be delayed in or be prevented from performing or carrying out the agreements, covenants, and obligations made by and imposed upon said parties, or either of them, by this paragraph, by reason of or thru strike, stoppage of labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any Court or Judge, granted in any bona fide adverse legal proceeding or action, order of any civil authority, explosion, act of God or the public enemies, or any cause reasonably beyond its control, and not attributable to its neglect,
then, and in such case or cases, such period of delay or pre-

443 vention shall not be reckoned or accounted as a part of the time within which such party was to perform and carry out the same, and the days, dates, times and period mentioned in this paragraph shall be extended for a period proportionate to such delay or prevention; provided, however, that the party or parties suffering such delay or prevention shall use all reasonable diligence to remove the cause or causes thereof, and either party shall give to the other written notice for such extension.

Rate and Payment.

Fourth. The Consumer agrees to receive and use said electric power, in such an amount and quantity as it requires or shall require to operate or drive the machinery, apparatus, and appliances in and upon its said plant and premises, as the same is equipped at the time the delivery of said electric power hereunder is or shall be

actually begun; and the Consumer hereby agrees to pay the Power Company for any and all of said electric power, at the following scale of rates, based upon monthly consumption, to-wit:

Payment shall be made at the office of the Power Company, located in Charlotte, N. C. Bills shall be rendered each month by the Power Company to the Consumer for the delivery of the electric power hereunder during the preceding month and each and every month, and all of such bills shall be payable by the Consumer monthly in gold coin of the United States of America, of or equal to the present standard of weight and fineness, or at the option of the Power Company (without waiving any of its rights to demand payment in gold coins aforesaid) by checks which shall be receivable by Charlotte (N. C.) banks at par; and the payment thereof, and all payments under this contract, shall be made at the office of the Power Company, on or before the fifth day of each and every month immediately succeeding or following that month in which the said electric power shall have been delivered, during the full term of this contract.

144

Service Charge.

Fifth. The Consumer agrees to pay, as a service and maintenance charge for the service rendered herein, the sum of \$— per month during each and every month of the term of this contract. The Consumer will be permitted to use — kilowatt hours per month without other charge than said service and maintenance charge.

Maximum Power.

Sixth. The maximum amount of electric power which the Power Company can be required to deliver under this contract shall be such an amount as the Consumer requires or shall require to drive its machinery, apparatus, and appliances, installed in its plant or premises at the time when the delivery of electric power hereunder is actually begun, not exceeding, however — kilowatts. And it is distinctly understood and agreed that the Consumer is not permitted to make use of the power herein contracted for, for the operation of any machinery used in addition to its plant, or for any rearrangement of its plant, or for any purpose connected with said addition or rearrangement, if by reason of said addition or rearrangement the total power consumed will be in excess of the maximum amount as set forth in this paragraph.

Uses of Power.

Seventh. The electric power delivered hereunder shall be delivered for the purpose of its being used by the Consumer as a motive power for operating and driving its machinery, apparatus, and appliances, in said plant and premises hereinbefore described and located, and for lighting said plant and at that place only, and for that purpose only, and the Consumer is not permitted to, and hereby agrees not to use, consume, or apply said electric power, or any part thereof,

in any place, or in any manner, or for any purpose other than as provided for in this contract, and the Consumer shall not have the right and hereby agrees not to transfer or assign this contract, nor
445 to sell or dispose of to others the whole or any part of the said electric power delivered hereunder, or which may be generated directly or indirectly therefrom, without the written consent of the Power Company first obtained.

Meters.

Eighth. The Power Company shall install and connect in the power circuit such watt-meters or meters as shall be necessary to measure and record the amount of electric power delivered. Said meters shall belong to and be kept in good repair by the Power Company, and shall be at all times, upon the written request of the Consumer, subject to such standard test as may be necessary to establish their commercial accuracy. The Consumer shall under no circumstances interfere with said meters, but in case of defective service shall immediately give notice thereof to the Power Company. If said tests show that the meters or any of their transformers, wiring, or connections have been damaged, and that because of such damage the meters are not commercially accurate, then and in that case said meters shall be restored to a condition of accuracy satisfactory to the representatives of both parties. If the inaccuracy of any instrument shall exceed two per cent. (2%), then the readings of such instrument previously taken shall be corrected on the basis of such test, but not for a greater period than thirty days prior to the date of the test, nor prior to a date within such thirty days on which such meters may have been accurate within two per cent. (2%).

Interruption of Service.

Ninth. The Power Company will provide a regular power service, and the Consumer will regularly and continuously receive, use, and apply same; but in case the Power Company shall be wholly or partially prevented from delivering the electric power hereunder, or in case the service thereof shall be interrupted or suspended, or fail, or in case the Consumer shall be prevented from receiving, using and applying the electric power, by reason of or thru strike, stoppage of labor, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of
446 any Court or Judge granted in any bona fide adverse legal proceedings or action, or any order of any civil authority, explosion, act of God or the public enemies, or any cause reasonably beyond its control, and not attributable to its neglect, then and in such event the Power Company shall not be obligated to deliver said electric power hereunder during such period, and shall not be liable for any damage or loss resulting from interruption, prevention, suspension, or failure, and the Consumer shall not be obligated or liable to pay for such power not delivered, furnished, or supplied

during such period; and in any and all such event or events, the party suffering such interruption, prevention, suspension, or failure shall be prompt and diligent in removing and overcoming such cause or causes thereof; provided, however, that either party whose plant shall suspend operation, by reason of accident to its machinery, plant or system shall proceed at once to repair the same within a reasonable time and failing to do so the limit of exemption from liability as fixed in this paragraph shall not apply, and the party so failing shall be liable to the other as tho no such limit or exemption had been fixed.

Delivery Point.

Tenth. The Power Company shall, at its own expense, extend its power line to the delivery point of power hereunder; and in the event that said delivery point is on the premises of the Consumer, it hereby gives and grants to the Power Company, during the continuance of this contract, the necessary rights-of-way, with all incident privileges, over its premises, whereon to erect and maintain said power line and other apparatus and appliances connected with the delivery of power hereunder; Provided that, said right-of-way shall follow as nearly as practicable a direct line from the point where it shall enter the premises of the Consumer to said terminal point; and any change in the location of either will be made by the Power Company upon the written and reasonable request of the Consumer; but the cost and expense of such change shall be borne by the Consumer. And provided, further, that said terminal point shall not be located inside of any mill building, transformer
447 house, motor-room, or other building; it being distinctly understood that the Power Company shall not be required to furnish, install, or construct any inside wiring, apparatus, appliances, or fixtures under this contract. The mains of the Consumer shall connect to and with the mains of the Power Company at the terminal point, and the Power Company shall make said connection. All wiring necessary to carry the power from the terminal point and distribute it to the motors, machines, and other apparatus thru and to which it is to be applied, and the work of installing all wires, motors, and other apparatus on the premises of the Consumer, shall be done by the Consumer, at its own proper cost.

Fire and Wind.

Eleventh. In the event of the total destruction of its mill by fire or wind, the Consumer shall have the right to terminate this contract, in case it should determine not to rebuild said mill; Provided however, that the Consumer shall give written notice to the Power Company within thirty days after the happening of such fire or wind, of such determination not to rebuild the mill; and provided, further, that in case the Consumer shall fail to give such notice or notices, or either of them, within the time specified, then the sums

and the charges herein agreed upon shall continue to be due and payable, as herein provided, as tho said fire or wind had not occurred.

Injury to Persons and Property.

Twelfth. Neither party hereto shall be responsible for accident or injury to the machinery, apparatus, appliances, or other property of the one, caused by lightning, defects in or failure of the machinery, apparatus, or appliances of the other; and the Power Company shall not be in any way responsible for the transmission or control of the electric power beyond the point of its delivery to the Consumer, and shall not, in any event, be liable for damages or injury to persons or property, arising, accruing, or resulting in any manner from the receiving, use, or application by the Consumer of said electric power. And the Consumer shall hold and save the

448 Power Company harmless from any and all loss or damage sustained, and from any and all liability to any person or property, incurred by the Power Company by reason of any negligence or misconduct on the part of the Consumer, its officers, agents, or employees, in constructing, maintaining, or operating its mill or plant on said premises, or any machinery, apparatus, or appliances used in connection therewith.

Ingress and Egress.

Thirteenth. The Power Company shall at all times during the continuance of this contract have the right of ingress to and egress from the premises of the Consumer, for any and all purposes connected with the delivery of electric power under this contract, or the exercise of any and all rights secured to, or the performance of any and all obligations imposed upon it by this contract.

Rights on Default.

Fourteenth. If default shall be made at any time by the Consumer in paying for the electric power delivered to it by the Power Company under and pursuant to the terms of this contract, and if such default shall continue for a period of twenty days, then the Power Company shall have the right, at its option, to terminate this contract, or at its option, without terminating or in any wise avoiding this contract, to discontinue, suspend, and withdraw the delivery, furnishing, or supplying electric power hereunder, until payment of all money due to it under the terms hereof from the Consumer shall have been made; and this option may be exercised by the Power Company whenever, and as often as, any such default shall occur and continue for said period of twenty days, and delay or omission on the part of the Power Company to exercise such option at any time shall not be deemed a waiver by it of its right to exercise such option whenever such default on the part of the Consumer shall occur. And the Consumer shall pay to the Power Company all loss and damages resulting to it from such suspension of delivery of

power hereunder. And in the event of such default in payment, or at the termination or expiration of this contract, then
449 it shall be lawful for, and the Consumer does hereby authorize and empower the Power Company, its successors and assigns, officers, agents, or employees, with the aid and assistance of any person or persons, to enter in and upon the premises of the Consumer, and such other place or places whatsoever as or in which any meter, apparatus, or other property of the Power Company may be, and remove and carry away the same.

Meter Readings.

Fifteenth. The Consumer agrees to carefully read the meter or meters installed by the Power Company, at six o'clock a. m. and six o'clock p. m. each day; and to mail readings to the Power Company each day.

Changes.

Sixteenth. No alteration of or addition to this contract shall be valid or binding, unless signed by the President or Vice-President of both parties.

Defects in Mill Apparatus.

Seventeenth. The Consumer agrees to maintain in good order and repair its electrical apparatus and appliances, and to be prompt and diligent in making repairs; and in case of defects existing in said apparatus and appliances which shall jeopardize the service of the Power Company, then and in that case the Power Company shall have the right, after giving written notice of such defects to the Consumer, to discontinue the furnishing of power until such defects shall have been repaired. Any delay or omission on the part of the Power Company to exercise such option shall not be deemed a waiver of its right to exercise such option whenever such default on the part of the Consumer shall occur, and the Consumer will pay to the Power Company all loss and damage resulting to it from such suspension.

Lighting Plant.

Eighteenth. The Consumer agrees that should it use any part or all of the power delivered hereunder for lighting, it will install and maintain all necessary and proper regulating and
450 controlling devices in connection therewith.

Counterclaims.

Nineteenth. It is mutually agreed that no claim or demand which the Consumer may have against the Power Company shall be set off or counterclaimed against the payment of any bill for electric power furnished hereunder, and all bills shall be paid as herein provided, regardless of such claim or demand.

Approval.

Twentieth. This contract is not binding on the Power Company until ratified and approved by its Board of Directors.

In witness whereof, on the day and year first above written, the said parties hereto have hereunto caused this agreement to be signed in duplicate, and caused their respective corporate names to be subscribed, and their corporate seals to be affixed hereto by their respective Presidents or Vice-Presidents, and attested by their respective Secretaries or Assistant Secretaries, duly authorized by resolutions duly adopted by their respective Boards of Directors. Southern Power Company, by ———, Vice-President. Attest: ———, Assistant Secretary. ———, by ———, Secretary. Attest: ———, President.

451

"Plaintiff's Exhibit N."*Contract.*

Memorandum of agreement, made and entered into this — day of —, by and between the Southern Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the first part, hereinafter design-ed and called the "Power Company," and —, a corporation duly organized and existing under and by virtue of the laws of the State of —, party of the second part, hereinafter designated and called the "Consumer":

Witnesseth: That in consideration of the mutual covenants and agreements hereinafter contained, the expected performance thereof, the electric power to be delivered, the sums of money to be paid, and other valuable considerations, the parties hereto, for themselves, their successors and assigns, have mutually agreed and do agree with each other as follows:

First. That the Power Company will sell and deliver to the Consumer, and the Consumer will receive from and pay to the Power Company, at the times and places, for the purposes, in the amounts, in the manner, and in accordance with the terms, limitations, and conditions hereinafter set forth — Kilotwatt hours of electric power, in the form of electrical energy, for and during each year of the term of — years from the date of this contract and thence next ensuing, for use by the Consumer and sale to its customers in and around —.

Second. Said electric power shall be of the class known and designated as Primary Power, and shall be delivered for and during twenty-four (25) hours per day for each and every day of said term of years; provided, however, that each of the parties hereto shall have the right to interrupt the delivery or use of power hereunder to make necessary repairs or alterations, and the parties hereto shall co-operate with each other so that said repairs or alterations may be made with the least possible inconvenience to

452

the parties hereto, having in mind their respective duties, rights, and obligations.

Third. Said electric power shall be three-phase alternating, at approximately sixty cycles per second periodicity, and shall be delivered by the Power Company to the Consumer at the following terminal or delivery points in — at approximately — volts, to wit:

Fourth. The Consumer covenants to pay for said electric power at the following scale of rates, based on monthly consumption, except as hereinafter expressly provided, to wit:

0 to	100 K. W.	Hrs. per Month	9c. per K. W. Hr.
100 "	150 "	" " " " " "	8c. " " " " "
150 "	200 "	" " " " " "	7c. " " " " "
200 "	300 "	" " " " " "	6c. " " " " "
300 "	400 "	" " " " " "	5c. " " " " "
400 "	500 "	" " " " " "	4c. " " " " "
500 "	1,000 "	" " " " " "	3.5c. " " " " "
1,000 "	2,000 "	" " " " " "	3c. " " " " "
2,000 "	4,000 "	" " " " " "	2.6c. " " " " "
4,000 "	8,000 "	" " " " " "	2.2c. " " " " "
8,000 "	16,000 "	" " " " " "	1.9c. " " " " "
16,000 "	32,000 "	" " " " " "	1.7c. " " " " "
32,000 "	50,000 "	" " " " " "	1.5c. " " " " "
50,000 "	100,000 "	" " " " " "	1.45c. " " " " "
100,000 "	200,000 "	" " " " " "	1.4c. " " " " "
200,000 "	400,000 "	" " " " " "	1.3c. " " " " "
400,000 "	500,000 "	" " " " " "	1.2c. " " " " "
All over 500,000	" " " " " "	" " " " " "	1.1c. " " " " "

Said payments to be made at the office of the Power Company in Charlotte, N. C., on or before the fifteenth day of each month, for the electric power delivered during the preceding month, upon bills therefor rendered the Consumer by the Power Company; provided, however, that if any customer of the Consumer in any one month shall consume over 5,000 Kilowatt hours of electric power, then the Consumer shall pay the Power Company for such power so consumed by customers using 5,000 Kilowatt hours and over in said month at the rate of one and one *thent* (1.1) cents per Kilo Watt Hour. The

Consumer shall submit to the Power Company at the end
453 of each and every month during the term of this contract a statement showing the meter readings of customers using the amounts of power above set forth, and the Power Company shall in addition thereto have the right and privilege to inspect and examine the books of and records of the Consumer for the purpose of verifying said statement; and should the Consumer fail to furnish unto the Power Company said statement of the meter readings of such customers on or before the 10th day of the month succeeding that in which such power was delivered, or to afford the Power Company the opportunity of inspecting and examining its books and records as aforesaid, then the Consumer will pay the Power Company for all

power delivered at the General rate in this paragraph hereinbefore set forth.

Fifth. The Power Company shall install at the said delivery points and connect in the power circuit such watt-meter or meters as shall be necessary to measure and record the amount of said electric power delivered. Said meters shall belong to and be kept in good repair by the Power Company, and shall be at all times upon the written request of the Consumer, subject to such standard test as may be necessary to establish their commercial accuracy. The Consumer shall under no circumstances interfere with said meters, but in case of defective service shall immediately give notice thereof to the Power Company. If said tests show that the meters or any of their transformers, wiring or connections have been damaged and that because of such damage the meters are not commercially accurate, than in that case, said meters shall be restored to a condition of accuracy satisfactory to the representatives of both parties. If the inaccuracy of any instrument shall exceed two (2%) per cent., then the readings of such instrument previously taken shall be corrected on the basis of such test, but not for more than thirty days prior to the date of the test, nor prior to a date within such thirty days on which such meters may have been accurate within two (2%) per cent.

Sixth. The Power Company shall, at its own cost and expense, extend its power lines to the said terminal or delivery points; 454 and for that purpose said Consumer, in the event that said terminals or delivery points are on its premises, hereby gives and grants to the Power Company for the life of this contract, such rights of way and incidental privileges, over its premises as may be necessary to erect and maintain said power lines and terminals; provided, that said rights of way shall follow as nearly as possible a direct line from the point where they shall enter the premises of the Consumer to said terminal points as aforesaid. The mains of the Consumer shall connect to and with the mains of the Power Company at the terminals or said delivery points. The Power Company shall make said connections and maintain the same in proper condition, furnishing and placing in proper locations all appliances necessary for this purpose, which appliances shall be and remain the property of and shall be maintained and kept in repair by the said Power Company.

Seventh. The Power Company shall regularly and continuously deliver, and the Consumer shall regularly and continuously receive and use said electric power as required for the aforesaid purposes. But should either of said parties, by reason of or through strikes, stoppage of labor, lightning, riot, fire, flood, ice, invasion, civil war, commotion, insurrection, military or usurped power, accident, order of any court or judge granted in any adverse legal proceeding or action, order of any civil authority, explosion, act of God or the public enemy, or any cause reasonably beyond its control and not attributable to its neglect, be wholly or partially prevented from or interrupted in performing this contract, then and in such event, the Power Company shall not be obligated to deliver, or the Con-

sumer to receive, said electric power to the extent so prevented or interrupted, and neither party shall be liable for any damage or loss resulting to the other party from such prevention or interruption; provided, however, that in any and all such event or events, the party suffering such prevention or interruption shall be prompt and diligent in its efforts to remove and overcome the cause or causes thereof, and should either party suspend operations by reason of accident or injury to its machinery, plant or system, and the same be not repaired within a reasonable time, the limitation of or exemption from liability in this paragraph contained
455 shall not apply and the party failing to so repair shall be liable to the other as though no such limitation or exemption had not been expressed.

Eighth. Each of said parties shall be solely responsible for any accident or injury occurring to or caused by its machinery, apparatus, appliances or other property of the operation thereof, or in or through its transmission, use or control of said electric power; and the Consumer undertakes and covenants to indemnify and save harmless the Power Company from all loss, cost or damage sustained by or received from the latter by reason of an accident or injury for which the former is hereby made solely responsible; and the Power Company undertakes and covenants to indemnify and save harmless the Consumer from all loss, cost or damage sustained by or recovered from the latter by reason of an accident or injury for which the former is hereby made solely responsible.

Ninth. Each of the parties shall at all times during the continuance of this contract have the right of ingress to and egress from the premises of the other for the exercise of any and all rights secured to it and the performance of any and all obligations imposed upon it by this contract.

Tenth. Should the Consumer fail to pay any bill for said electric power rendered by the Power Company within thirty (30) days from the receipt thereof, unless because of a dispute in good faith as to the correctness thereof, then the Power Company shall have the right at its option to discontinue the delivery of electric power until payment of all money due to it under the terms hereof by the Consumer shall have been made; and this option may be exercised by the Power Company whenever, and as often as, any such default shall occur and continue for said period of thirty (30) days, and delay or omission on the part of the Power Company to exercise such option at any time, shall not be deemed a waiver by it of its right to exercise such option whenever such default on the part of the Consumer shall occur or continue.

456 Eleventh. During every month of July in said term the Consumer and Power Company shall co-operate in ascertaining and declaring the amount of electric power used for the aforesaid purposes by the Consumer during the preceding twelve months. If the said amount be less than the amount required to be delivered and received during said twelve months by this contract as made or as amended in accordance with the terms of this paragraph, (if it has been so amended), then this contract shall be thereby so

amended as to require only the amount so ascertained to have been used in said twelve months to be delivered and received during each of the succeeding years covered by this contract. If the said amount be more than the amount required to be delivered and received during said twelve months by this contract as made or as amended in accordance with the terms of this paragraph, (if it has been so amended), then the Consumer shall have the option of so amending this contract as to substitute the amount so ascertained to have been used in said twelve months as the amount to be delivered and received during each of the succeeding years covered by this contract.

Twelfth. The Power Company agrees that notwithstanding the amounts of power to be delivered under this contract as fixed by paragraph One and paragraph Eleven hereof, that it will during any year of the term of this contract deliver to the Consumer an amount of power sufficient to supply its requirements, and in consideration of such agreement on the part of the Power Company the Consumer agrees that should it decrease the amount of power to be delivered hereunder during any such year, by its voluntary act, then in such event it will pay to the Power Company for the amount of power agreed to be purchased in paragraph One hereof or as amended, (in the event it has been amended), notwithstanding the fact it may not actually have used and consumed said amount.

Thirteenth. If at any time during the life of this contract, the Consumer should use for any of the aforesaid purposes electric power secured elsewhere than from the Power Company, there shall be no discrimination in the use of said electric power, but it
457 shall be used only in a like service shall be determined on a pro rata basis in accordance with the amount of electric power furnished the Consumer by each of its sources of supply.

Fourteenth. No claim or demand which the Consumer may have against the Power Company shall be set off or counter-claimed against the payment of any bill for electric power furnished hereunder, and all bills shall be paid as herein provided, regardless of such claim or demand.

Fifteenth. No alteration of or addition to this contract except as hereinbefore stated, shall be valid or binding unless in writing duly authorized and executed by both of the parties hereto.

Sixteenth. In the event that at any time it shall become necessary for any cause to change or move the delivery points of power hereunder, increase or decrease the number of delivery points or voltage, then such decreases, increases or changes shall be made and the expense of making the same shall be equitably apportioned between the parties hereto, and if they cannot agree as to the necessity of making such change, or the equitable adjustment of the expense in connection therewith then the question or questions shall be settled by arbitration as hereinafter provided.

Seventeenth. In the event that the parties hereto cannot agree as to the true meaning or intent of any part of this contract, or in case of any dispute or disagreement arising or growing out of the

same, the question or questions in dispute shall be first reduced to writing and shall be referred to three arbitrators, one of whom shall be selected by each of the parties hereto, and the two so chosen shall select the third, and said arbitrators shall have the right to hear any question submitted to them and take such evidence as they may desire, and their decision or the decision of a majority of them shall be binding on the parties hereto, and the arbitrators shall apportion equitably the cost of the arbitration.

458 Eighteenth. The Consumer agrees to carefully read the meters installed by the Power Company at six o'clock a. m. and six o'clock p. m. each day, and the Consumer agrees to mail readings to said Power Company each day.

Nineteenth. The Consumer will install and maintain or be responsible for the proper installation and maintenance of all necessary and proper regulating and controlling devices in connection with the use or sale of the said electric power.

In witness whereof the said parties hereto have executed this agreement in duplicate by causing their respective corporate names to be subscribed and their respective corporate seals to be affixed hereto by officers duly authorized so to do. Southern Power Company, By ———, Vice-President. Attest: ———, Assistant Secretary. ———, by ———. Attest: ———.

"Plaintiff's Exhibit O."

Allegation 15 of the Complaint in Case of Salisbury & Spencer Ry. Co. and N. C. Public Service Co. vs. Southern Power Co.

15. That the said J. B. Duke, President of the defendant Company, as aforesaid, as plaintiffs are advised and believe, is the principal owner, either directly or indirectly through his immediate family, of a subsidiary corporation of the Southern Power Co., known as the Southern Public Utilities Company, which last named company in turn owns the Public Utility franchises in Charlotte, 459 Winston-Salem, Reidsville, and other towns and cities, and is now engaged in furnishing hydro-electric power and light to these municipalities which it purchases from the defendant Power Company; that the defendant Power Company, acting by and under the influence of the said J. B. Duke, and in his interest, is furnishing power to this Utility Company at each of its stations in Charlotte, Winston-Salem, and Reidsville, under a long term contract extending to 1944, and at a less rate than it now charges and proposes to charge the plaintiffs for current furnished for like service under substantially similar conditions at its sub-station near Salisbury.

Section 15 of the Answer of defendant in said suit, — as follows:

15. That replying to article fifteen of the complaint it is admitted that J. B. Duke is interested in the Southern Public Utilities Co. which holds franchises in the cities referred to in said articles of the complaint, and in other cities and towns, and is engaged in furnishing light and power to said cities which it purchases from the defendant company. It is admitted that the power company

is furnishing power and current to said Southern Public Utilities Company for the cities and town in which it operates except the town of Reidsville under a long term contract extending to 1944. That the contract between the defendant power company and said Southern Public Utilities Company for power and current which the latter furnishes to certain of the cities and towns in which it operates was made several years ago and prior to the power company's increase in its rates on December 5, 1917. That in said contract it is expressly provided that for any additional power which the Utilities Company may acquire from the Power Company it shall pay the prevailing rate at the time of acquiring such power; that since the power company's increase in rates of December 5, 1917, said Utilities Company has entered into a contract for a period of ten years with the Power Company for furnishing it power for the town of Reidsville, and the rate fixed in said contract and at which the Utilities Company is paying the Power Company for such power is the increased rate of December 5, 1917; that the
460 rate and term of said contract are identically the same as those offered the plaintiff Public Service Company in August, 1918, and the same rate and terms upon which the Power Company has since entered into other contracts with cities and towns, to wit, with the towns of Lincolnton, Shelby and Newton, N. C. and it has since said increase in rates made no contract with any other city or town or Public Service Company upon any other or different rate, or upon other or different terms.

That the rate and terms offered the plaintiff Public Service Company in August, 1917, prior to the increased rate in December, 1917, were the same as those contained in the contract then existing between the defendant and the said Southern Public Utilities Company. The defendant Power Company further avers that the contract which it proposed to make with the Public Service Company contained a provision that said company would be charged a flat rate of 1.2c per kilowatt hour for the power consumed by any one customer who would take the regularity as much as 5,000 kilowatt hours per month, which provision is one regularly contained in contracts entered into by the defendant with cities and towns and other public service corporations. That except as herein expressly admitted the allegations of article fifteen of the complaint are untrue and denied.

Opinion of the Court.

The Court is decidedly of the opinion that this complainant the Public Service Co. does not occupy the relation to the Southern Power Co. of a buyer as a part of the general public, for its own consumption. The fact that defendant has heretofore sold it power has not, under the circumstances as the court views it, constituted that character of usage which would effect a dedication of the property and power of the defendant to that particular kind of use. In other words the power furnished heretofore has been by virtue of a special contract, and when the contract ended then the parties were

restored to the position towards each other that they occupied before the contract began. And that view of it applies to any other company which was the purchaser and distributor of power furnished by the defendant.

461 Now the defendant permitted the complainant, the Service Company, to continue the use of its power after the contract expired, but instead of that action being adverse to the interest of the complainant it was entirely favorable to it. I do not think this defendant has shown any animosity to the complainant, by the evidence in the case. On the other hand, as I see the testimony it shows that after the contract expired and for more than a year, ending the first of January, 1921, defendant continued to furnish the Public Service Company, with power at an exceedingly low rate, and it did that until the first of January, 1921. So was it done at High Point, and for that defendant was paid, I believe at the rate of six mills per kilowatt hour. That was a little more than it cost to produce it by steam, as I understand.

Now as to renewing the contract, the view that the Court entertains is, the contract having expired, it was the privilege of either company, either the defendant or the complainant to renew it if they agreed upon terms. I think that it was the legal right of either one to renew. Very certainly, if the Public Service Company had said to the Power Company, we do not wish to continue our relations with you any longer, we do not wish to renew our contract with you for any further time, there is no law the court is cognizant of by which the Southern Power Company, could have compelled the Public Service Company to continue. If that is true, if it is a contract which was ended as to one, it necessarily follows that it was a contract which was ended as to the other.

Going further, it is asserted that the defendant was arbitrary in its demands for renewal of the contract, that the Public Service Company was anxious to renew the contract, but that the Power Company undertook to impose unusual and oppressive terms to which complainant would not agree. I do not think that the evidence sustains that view. The defendant said, "We will furnish you the power provided you will agree to pay our established rate—the rate that we have established." The complainant declined to pay that, but as I understand the law it could have entered into that contract for five years, and if that was an unusual or unreasonable or discriminatory rate the State of North Carolina has provided a method by which that matter could be determined, and any injustice corrected.

462 That is, the Corporation Commission could have said whether or not that rate was reasonable or whether it was uniform and whether it was discriminatory, and both these parties, notwithstanding their contract, would have been compelled to abide by the decision of the Corporation Commission, unless upon an appeal to the court it was changed.

I do not know whether or not it is necessary to discuss the question as to whether or not the defendant is a monopoly in the production and sale of hydro-electricity. There are, as has been stated here, two kinds of monopolies. One class of monopoly is odious and ob-

noxious to the public, because by virtue of its control of certain business it can impose upon and oppress. That is what we denominate as an odious monopoly, that is the kind of monopoly that the National anti-trust law was intended to correct, that is, the concentration of a particular line of business into the hands of a person or corporation so that it restrained trade and took away from the public the right to benefit from competition.

The other class of monopoly is not only not obnoxious but is favorable where it is of that character that appeals to the public conscience and deals with the public in a manner to be of benefit to the public. So far as the evidence shows here this defendant has largely the control of the production of hydro-electric current in North Carolina. I believe that the testimony is that there is one other plant that produces power and that is the plant at Badin, which is not under the control of this company. But how does that happen? From the evidence it appears to the Court that the Southern Power Company made the venture, it sought to utilize the waters of a particular stream which traverses North and South Carolina for the establishment of plants to produce this character of electricity, and it invested the money, bought the lands, built the necessary locks and dams and expended large sums of money,—some thirty-eight million dollars—it seems to be admitted here—in that character of business. However, the opportunity is afforded every other person, or as many others as might be inclined, to enter into that business, the waters 463 powers in North Carolina afford the opportunity to invest and improve.

Unless it could be shown that by reason of this situation this company is oppressing the public to whom it owes a duty then it could not be characterized as an offensive or an unlawful or obnoxious or an odious monopoly, so I do not think the evidence would sustain any court in determining that this is an unlawful or an odious monopoly. The complainant itself was authorized by its charter to establish mills and to operate hydro-electric plants, and it seems from the testimony, that it had in mind to do that at one time at a place called High Rock on the Yadkin River, some miles below the Southern Railway bridge on that river. It has a perfect right to do that now. Whether it has the means to do it or not does not enter into this consideration. If it is a plausible proposition, if it is a scheme that appeals to business and those who understand the nature of investment and financial returns, if it is that kind of proposition I do not see any reason why it may not be availed of on other streams than that utilized by defendant and by other parties.

A great many things have been brought into this case which as far as I am concerned will not effect me in passing upon the legal and equitable rights of these parties. As to their abuse of each other I did not hear any evidence that the defendant had used any unseemly terms or characterizations of the complainant. It does appear in the course of somebody's brief, or perhaps it was in the newspaper controversy, that the defendant was called a water pirate, and some testimony that it has been charged with being an obnoxious

and unlawful monopoly. I do not know whether that is in the pleadings.

My purpose is to pass upon this matter without preparing any well ordered or logical opinion here, to pass upon it in view of the facts and the law, to determine the relative rights of these litigants.

I must say that I do not see precisely the interest that these two cities have in this litigation except in so far as it may be necessary for them to join to protect themselves from being deprived of the benefits of this property. That they have a right to do and that they

ought to do, because, in conferring upon not only this defendant, but any person or corporation the right of eminent domain and thereby becoming a public service company or a public service agency, when these sovereign rights are surrendered, the purpose of the law is that the person or corporation receiving them shall serve the public as well as they can, faithfully and honestly, and the return required, is, considering their investment, considering the cost of their improvements, considering the cost of their production, a reasonable amount as compensation for the service.

Getting down to the last analysis of this case, this Public Service Company is not a part of that general public, contemplated by law to which defendant owes a duty, but is a dealer in defendant's product. It is a mere intermediate, it is the middle man between the producer and the consumer and it is the middle man for profit. Of course we have heard a good deal said about the disposition to abolish the middle man. Passing along down the street you will see an advertisement, "Clothing from the manufacturer to the wearer." That appeals to people because they conclude that they will get rid of the middle man, the man who is to make a profit upon the manufacturer's price before it gets to the consumer. However, if the middle man is necessary then there is no reason why he should not exist, but if he is unnecessary, then the consumer, upon whom the profit falls at least, is entitled to have him abolished.

As I said in the outset, as I understand it, I do not think the complainant in this case, the Public Service Company, is entitled to have a mandamus commanding this defendant to furnish the power which it generates, especially without a price, for an indefinite term and in indefinite quantities.

The Cities of Greensboro and High Point, both of which are joined as complainants do not appear to seek any relief directly, and their interest, if any, in the controversy seems to be merely incidental.

Complainant's bill is dismissed.

Decree.

Filed June 29, 1921.

[Title omitted.]

This cause came on to be heard at this term and the Complainants having moved for judgment upon the pleadings, the motion was overruled, and the complainants stated to the Court that they desired to.

introduce no evidence in support of the allegations of the bill of complaint put in issue by the defendant's answer, and that they submitted the cause for final hearing on its merits upon the allegations of the bill of complaint and the admissions contained in the answer of the defendant.

The defendant stated that it desired to introduce in support of the affirmative defenses and counterclaims set up in its answer, and the defendant was permitted to introduce such evidence over the objection of the plaintiffs, and the plaintiffs then introduced evidence in reply to that of the defendant.

Now after hearing and considering the pleadings, the evidence introduced by the parties and the argument of counsel, the court finds as facts from the evidence and the admissions in the pleadings that defendant has never dedicated its property to the public use of selling electricity to other public utility companies for resale and distribution by such companies; that while the defendant has in some cases sold electricity to other public utility companies to be resold and distributed by them and has also in other cases sold electricity to municipalities for the use of such municipalities, their citizens and inhabitants, all such sales have been made under special contracts, in each case particularly limiting and defining the amount and character of electricity sold by the defendant, the time during which the same should be sold and delivered and the terms and conditions of the sale and delivery thereof.

466 The Court finds the further facts that the complainant, the North Carolina Public Service Co. by its charter, has the right to secure, develop and operate hydro-electric plants and to generate electricity and sell and distribute it; that the powers granted the North Carolina Public Service Co. in this respect are the same as those possessed by the Southern Power Co.

The Court further finds as a fact that the complainant, North Carolina Public Service Co. sells and distributes electricity that has been purchased from the defendant in competition with the defendant.

The Court further finds as a fact that the defendant did heretofore contract and agree with the High Point Electric Power Company to sell it electricity for its use and for resale and distribution at High Point, North Carolina, and with the Greensboro Electric Company for the sale of electricity for its use and for resale and distribution at Greensboro, N. C., that the complainant, North Carolina Public Service Company, thereafter acquired the property and franchise of each of said companies and succeeded to the rights of each under its contract with the defendant for the purchase of electricity as aforesaid; that the contract originally made with the High Point Electric Power Company expired in December, 1919, and the contract originally made with the Greensboro Electric Company expired in January, 1920; that prior to the expiration of said contracts the defendant offered to enter into further contracts with the complainant, North Carolina Public Service Company, for the sale of electricity at High Point and Greensboro at the rates then established and in force

by the defendant and at which it was then contracting with other customers for similar service, but which said rates were one mill a kilowatt hour in advance of the price which the defendant was charging the Southern Public Utilities Company for the sale of electricity at Charlotte, North Carolina, under a contract which had been entered into between the defendant and the Southern Public Utilities Company prior to the adoption by the defendant of the rates in force at and shortly prior to the expiration of the aforesaid contracts to which the complainant, North Carolina Public Service Company, had succeeded; that the North Carolina Public Service Company con-

467 tended that it was entitled to contract with the defendant for the purchase of electricity at Greensboro and High Point at the same rate per kilowatt hour which the defendant was charging the Southern Public Utilities Company for electricity at Charlotte, North Carolina, under the contract aforesaid, notwithstanding the fact that said contract was made and entered into prior to the adoption by the defendant of the rates in effect at the time of the expiration of said complainant's contracts, and that the defendant was charging said Southern Public Utilities Company and other customers a higher rate at places other than Charlotte and the North Carolina Public Service Company declined to enter into further contracts with the defendant at the defendant's rates then in effect; that after the expiration of the said original contracts the defendant continued during the year 1920 to sell and deliver electricity to the complainant, North Carolina Public Service Company, for its use and for resale and distribution at Greensboro and High Point under and pursuant to the terms of the letters attached to and made a part of the bill of complaint and identified as Exhibits "A" and "B"; that after the institution of this suit and its removal from the Superior Court of Guilford County, North Carolina, to this Court, the Superior Court of Guilford County, North Carolina, declining to recognize the right of the defendant to remove said suit to this court entered an order restraining and enjoining the defendant from discontinuing the sale and delivery of electricity to the complainant, North Carolina Public Service Company, at Greensboro and High Point, for the uses and purposes aforesaid, until the final hearing of this cause, and thereafter the complainant, North Carolina Public Service Company, in consequence of a letter from the defendant to the North Carolina Public Service Company advising it that, unless the defendant's bills for electricity theretofore furnished at Greensboro and High Point were paid, the defendant would notify the two cities and thereafter discontinue service to the North Carolina Public Service Company, applied to this court for a preliminary injunction restraining the defendant from discontinuing the sale and delivery of said electricity to said complainant until the final hearing of this cause in this court, whereupon, upon the intimation of the Court that the defendant should continue the sale and delivery of said elec-
468 tricity until said final hearing and leave the rights and equities of the parties to be then settled and adjusted, the defendant in deference to such intimation waived the necessity of a formal order restraining it from discontinuing the sale and delivery

of such electricity and has continued the sale and delivery thereof to the complainant, North Carolina Public Service Company, up to this time.

It further appears to the Court that since January 1, 1921, the defendant has rendered to the complainant, North Carolina Public Service Company, monthly bills for the electricity sold and delivered to it in accordance with the schedule of rates filed by the defendant with the North Carolina Corporation Commission, namely in accordance with schedule No. 8 of said schedule of rates covering sales of electricity to municipalities and for miscellaneous purposes, which said rates are higher than those charged the Southern Public Utilities Company at Charlotte under the existing contract with said company; that the North Carolina Public Service Company has declined to pay these bills and has tendered to the defendant checks in payment for said electricity, at the rate of six mills per kilowatt hour, which checks the defendant has declined to receive and has returned to the North Carolina Public Service Company, and said North Carolina Public Service Company remains indebted to the defendant for the electricity sold and delivered to the North Carolina Public Service Company since January 1, 1921.

It further appears to the Court that after the removal of this suit from the Superior Court of Guilford County, North Carolina, to this Court the complainants undertook to continue the prosecution of this suit in said Superior Court of Guilford County, North Carolina, and that as a result thereof the defendant applied to this Court for a preliminary injunction, enjoining the complainants, until the final hearing of this cause, from proceeding further with the prosecution of this suit in said Superior Court of Guilford County, North Carolina, or in any other court than this Court, until the final hearing of this cause, and that upon such application the court granted the injunction prayed for by the defendant.

The Court is of the opinion, and so holds, that the complainants have no legal right to require and compel the defendant to sell and deliver electricity to the complainant, North Carolina Public Service Company, for resale and distribution by said North Carolina Public Service Company to the said cities of Greensboro and High Point and their citizens and inhabitants and to the other customers of said North Carolina Public Service Company and that the complainants are not entitled to have the defendants enjoined from discontinuing the sale and delivery of electricity to said North Carolina Public Service Company for said uses and purposes.

The Court is of the further opinion, however, that the complainant, North Carolina Public Service Company, is entitled to require the defendant to sell and deliver to said complainant at the terminal or delivery point at which the defendant has heretofore sold and delivered electricity to said complainant, electricity for use by the complainant, North Carolina Public Service Company, as a motive power in operating and propelling the said street railway systems operated by said complainant in the cities of Greensboro and High Point and vicinities thereof, provided that said North Carolina

Public Service Company make application to said defendant for such electricity and receive and pay for same upon the same terms and conditions and at the same rates and under like rules and regulations as the defendant sells and delivers electricity to other customers for similar uses and purposes under similar conditions, provided, further, however, that said North Carolina Public Service Company forthwith pay the defendant, on account of the electricity which has been heretofore sold and delivered to said North Carolina Public Service Company since January 1, 1921, the sum of Forty four Thousand, Seven hundred, seventeen dollars and forty cents (44,717.40), being the amount conceded to be due therefor at the rate of six mills per kilowatt hour, and forthwith make and execute to the defendant a good and sufficient bond in the sum of Thirty seven thousand dollars (\$37,000.00) to be approved by the Court conditioned upon said North Carolina Public Service Company duly paying to the defendant such further sum for said electricity as may hereafter be determined according to law to be due and owing therefor; the amount of said bond not to be used by either party as evidence of any balance due for said electricity.

The Court is, however desirous of incorporating in this decree such reasonable terms as will afford the complainants, Cities of Greensboro and High Point, an opportunity to make such arrangements as they may be advised to make in order that said cities of Greensboro and High Point and their citizens may not be deprived of the use and benefit of electric current and power for the uses and purposes heretofore and now enjoyed by them, and also to afford the complainant, North Carolina Public Service Company, an opportunity to make such arrangements as it may be advised to make in order to continue the prosecution of its business.

Now therefore, it is accordingly ordered, adjudged and decreed as follows:

I.

That the complainants have no legal right to require and compel the defendant to sell and deliver electricity to the complainant, North Carolina Public Service Company, for resale and distribution by said North Carolina Public Service Company to said cities of Greensboro and High Point and their citizens and inhabitants and to the other customers of said North Carolina Public Service Company and that the complainants are not entitled to have the defendant enjoined from discontinuing the sale and delivery of electricity to said North Carolina Public Service Company for such uses and purposes.

II.

That the North Carolina Public Service Company is entitled to require the defendant to sell and deliver to said North Carolina Public Service Company at the terminal or delivery point at which the defendant has heretofore sold and delivered it electricity for use

by the complainant as a motive power in operating and propelling the street railway systems operated by said complainant in the cities of Greensboro and High Point and the vicinities thereof upon the terms and conditions hereinbefore recited and set out in this decree.

471

III.

That the Court in the exercise of its discretion and in order, as hereinbefore recited, to afford the cities of Greensboro and High Point an opportunity to make such arrangements as they may be advised to make whereby said cities may not be deprived of the use and enjoyment of electric current and power for the uses and purposes aforesaid heretofore and now enjoyed by them, as well as to afford the North Carolina Public Service Company an opportunity to make such arrangements as it may be advised to make to enable it to continue to prosecute its business, further orders, adjudges and decrees that for and during the period of six months from the date of this decree the defendant shall continue to sell and deliver to the North Carolina Public Service Company electricity for the use and benefit of said cities of Greensboro and High Point and their citizens and inhabitants and those in the vicinities of said cities as they are now being served by said complainant, as the defendant has heretofore sold and delivered such electricity to said North Carolina Public Service Company, upon condition, however, that the complainant, North Carolina Public Service Company, duly and promptly make the payment and make and execute to the defendant the bond hereinbefore provided for on account of the electricity heretofore and since January 1, 1921, sold and delivered to it by the defendant; and upon the further condition that pending and until the just and reasonable price to be collected and paid for said electricity to be sold and delivered during said period of six months is established, according to law, said North Carolina Public Service Company shall pay the defendant for such electricity as shall be delivered to it at Greensboro and High Point respectively in accordance with the schedule of rates heretofore filed with the Corporation Commission of North Carolina and now pending before said Commission for its approval, namely, in accordance with schedule No. 8, of said schedule of rates, which applies to sales of electricity to municipalities and for miscellaneous purposes, and being the same schedule under which the defendant is offering to contract with other customers, and thereafter and during the un-

expired portion of the said six months' period hereinbefore referred to shall pay for said electricity at such just and reasonable rates as may be established by law, which said payments shall be made on or before the 10th day of the month succeeding that during which said electricity should have been sold and delivered, and provided however, in order that the rights of the respective parties may be fully protected in respect to the price to be collected and paid for said electricity during said period of six (6) months, the said North Carolina Public Service Company may make said payments under protest, fully reserving all its rights in

respect thereto, and provided further that the defendant, within ten (10) days from the date hereof, shall make and duly execute to the complainant, a good and sufficient bond in the sum of Fifteen Thousand dollars (\$15,000.00) to be approved by and remain subject to the further orders of the Court, duly providing and conditioned as follows, to-wit:

That the defendant shall duly and promptly repay to the complainant, such sum or sums of money, if any, as the defendant may be found to have collected from the said North Carolina Public Service Company for said electricity during the said period of six months at the rates above set forth in excess of such just and reasonable price therefor as may be established by law.

IV.

It is further ordered, adjudged and decreed that the complainants, North Carolina Public Service Company, City of Greensboro and City of High Point, their officers, attorneys, agents, employees, and confederates, and each of them, be, and they hereby are permanently enjoined and restrained from directly or indirectly, prosecuting or proceeding further with this or any other suit, action or proceeding, embracing or involving the subject of this suit in the Superior Court of Guilford County, North Carolina, or in any other court.

V.

It is further ordered, adjudged and decreed that the complainants pay the costs of this suit, to be taxed by the Clerk.

473

VI.

This cause is retained for such further orders and decrees as may be necessary or appropriate to carry out the provisions of the foregoing decree.

This the 29th day of June, 1921. Jas. E. Boyd, U. S. Judge.

The complainants except to the foregoing decree and every part thereof.

Notice to the Defendant of Hearing on September 6, 1921, for Judge to Approve Statement and Exhibits.

[Title omitted.]

To the appellee, Southern Power Company:

You are hereby notified that the complainants have this day lodged in the office of the Clerk of the United States District Court at Greensboro, for your examination, a narrative form of the testimony of the witnesses, and also copies of the exhibits taken and introduced in the suit above named recently heard and determined in the United States District Court, sitting at Greensboro, wherein a

final decree was entered on the 29th day of June, 1921, from which said decree an appeal to the Circuit Court of Appeals has been this day allowed.

You are further notified that on the 6th day of September, 1921, at 10 o'clock A. M., at Greensboro, the Hon. James E. Boyd, Judge of the United States District Court, will be asked to approve
474 the said statement and exhibits. (Signed) A. L. Brooks,
King, Sapp and King, Chas. A. Hines, Dred Peacock,
Solicitors.

Service accepted this 25th Aug., 1921. (Signed) Wm. P. Bynum,
of Counsel for Defendant.

Præcipe.

[Title omitted.]

To the Clerk of the United States District Court for the Western District of North Carolina:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fourth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in said transcript the following:

1. Defendant's petition for removal from the State Court, including the entire transcript as certified by the Clerk of the Superior Court of Guilford County, filed September 15, 1920.
2. Notice of removal, dated September 15, 1920.
3. Answer of the defendant, filed September 23, 1920.
- 475 4. Reply of complainants, filed November 20, 1920.
5. Motion to remand, filed December 22, 1920, and order denying the same and exceptions.
6. Defendant's second petition for removal from the State Court, including the entire transcript, as certified by the Clerk of the Superior Court of Guilford County, filed January 10, 1921.
7. Defendant's supplemental petition, filed May 13, 1921.
8. Order of Court to show cause, filed May 13, 1921.
9. Complainant's reply to supplemental petition, filed May 21, 1921.
10. Order of Court continuing injunction, filed June 16, 1921.
11. The testimony of the following witnesses, whose evidence has been reduced to narrative form, copy of which is now on file in your office: W. S. Lee, R. L. Pickett, V. M. Morris, G. C. Howard, J. W. Matthews and Z. B. Nicholson.
12. All of the defendant's exhibits now on file in your office, Nos. 1 to 46 inclusive.
13. All of plaintiff's exhibits, Nos. "A" to "O" inclusive, now on file in your office.
14. Final decree of the Court, dated June 29th, 1921.
15. Petition for appeal.
16. Order allowing appeal.

17. Assignment of errors.

18. Bond for cost.

476 19. Citation.

20. Notice of giling of narrative form of testimony with the Clerk.

21. Præcipe.

(Signed) A. L. Brooks, King, Sapp and King, Chas. A. Hines, Dred Peacock, Solicitors for Complainants.

Service accepted this the 25th day of August, 1921. (Signed) Wm. P. Bynum, of Counsel for Defendant.

Præcipe of the Appellee.

[Filed Sept. 14, 1921.]

[Title omitted.]

To the Clerk of the United States District Court for the Western District of North Carolina:

The appellee, the Southern Power Company, through its solicitor, William B. Bynum, in addition to the papers, records and documents specified in the Præcipe of the appellants, heretofore filed with you on the 25th day of August, 1921, hereby requests you to include in the said transcript as a part of the record on appeal in the said suit the following papers:

477 1. Order allowing defendant time to file answer, dated October 12, 1920, filed October 13, 1920.

2. Motion to remand and the refusal thereof and the order retaining the case on the equity side of the Court, dated and filed December 22, 1920.

3. Order concerning bond of North Carolina Public Service Company, dated and filed May 5, 1921.

4. Order continuing restraining order and setting case for trial June 16, 1921, dated and filed May 21, 1921.

5. Petition and order dated June 9, 1921, directed to the North Carolina Public Service Company to produce contracts, papers, documents, etc., at trial of cause.

6. Motion of the North Carolina Public Service Company and others for judgment on the pleadings, dated June 16, 1921. WM. P. Bynum, Solicitor for Appellee.

Memorandum of Clerk.

Petition for Appeal filed August 25, 1921.

Order allowing Appeal filed August 25, 1921.

Bond of North Carolina Public Service Company in the sum of \$500.00, with L. H. Hole, Jr., and H. R. Bush sureties, filed August 25, 1921.

Citation issued on August 25, 1921, and service of Citation accepted on August 25, 1921, by Wm. P. Bynum, of counsel for defendant.

Assignment of Errors.

[Title omitted.]

478 And now on this the 25th day of August, 1921, came the complainants, by their solicitors, A. L. Brooks, King, Sapp & King, Chas. A. Hines and Dred Peacock, and say that the decree entered in the above cause on the 29th day of June, A. D. 1921, is erroneous and unjust to the complainants:

First. Because the Court declined and refused to grant complainants' motion for judgment on the admitted and uncontroverted facts appearing from the face of the pleadings on file in said cause.

Second. Because the Court found as a fact from the evidence and the admission in the pleadings that the defendant has never dedicated its property to the public use of selling electricity to other public utility companies for re-sale and distribution by such companies.

Third. Because the Court further found as a fact "that the complainant North Carolina Public Service Company sells and distributes electricity that has been purchased from the defendant in competition with the defendant."

Fourth. Because the Court was of opinion and decreed that the North Carolina Public Service Company was entitled to purchase electric energy as a motive power to operate and propel its street railway systems in Greensboro and High Point, provided, however, that the North Carolina Public Service Company should forthwith pay the defendant on account of electricity which had been theretofore sold and delivered to the said North Carolina Public Service Company since January 1, 1921, the sum of forty-four thousand seven hundred and seventeen dollars and forty cents (\$44,717.40), and further required that the Public Service Company execute a bond in the sum of thirty-seven thousand dollars (\$37,000.00) for the benefit of the defendant, conditioned upon its paying to

479 the defendant such further sum for said electricity as may hereafter be determined according to law to be due and owing therefor, despite the fact that there are no allegations or prayer in the pleadings touching or asking for such relief.

Fifth. Because the Court failed to find as a fact as prayed for by the complainants, from the admitted and undisputed facts in the pleadings and from the uncontradicted evidence offered by the defendant, that defendant owns and operates the only hydro-electric lines connecting with Salisbury, High Point and Greensboro; that the nearest hydro-electric plant to Greensboro is Badin, seventy-five miles distant, and that this plant has no transmission lines, and defendant has built its lines to Badin and connects with this power and is purchasing power from said company.

Sixth. Because the Court failed to find as a fact, as prayed for by the complainants, from the admitted and undisputed facts in the pleadings, and from the uncontradicted evidence offered by the defendant, that the defendant owns several undeveloped hydro-electric power plants in North and South Carolina, and has connected its transmission lines to the south with the Georgia Railway and Power Company's hydro-electric lines, and to the east, near Raleigh, it has connected its lines with the Carolina Power & Light Company's hydro-electric transmission lines, and has contracts with each of said companies to purchase hydro-electric current from them.

Seventh. Because the Court failed to find as a fact, as prayed for by the complainants, from the admitted and undisputed facts in the pleadings, and from the uncontradicted evidence offered by the defendant, that several years ago the complainant North Carolina Public Service Company built a transformer station at and connected with the defendant Southern Power Company's sub-station at Greensboro, and erected a line of about five miles in length to serve power to three fertilizer factories, and also extended its service lines for light in the vicinity of Greensboro to the State Normal College, Guilford College and other residential sections around Greensboro, and that these extensions were made with the knowledge and acquiescence of the defendant.

480 Eighth. Because the Court failed to find as a fact, as prayed for by the complainants, from the admitted and undisputed facts in the pleadings, and from the uncontraverted evidence offered by the defendant, that the defendant is also engaged in selling current and power to about three hundred cotton mills in North and South Carolina, which current is used for power in the mills, and also for lighting the mill villages around, including the stores, school houses, etc.

Ninth. Because the Court failed to find as a fact, as prayed for by the complainants, from the admitted and undisputed facts in the pleadings, and from the uncontradicted evidence offered by the defendant, that the defendant is not engaged in selling current and power in any town or city in North Carolina, at retail, except in Salisbury, where it applied for and obtained a franchise after the complainant Public Service Company brought suit against it to require continued service.

Tenth. Because the Court failed to find as a fact, as prayed for by the complainants, from the admitted and undisputed facts in the pleadings, and from the uncontradicted evidence offered by the defendant, that in 1919, prior to the expiration of the contracts at High Point and Greensboro, negotiations were again entered into between the complainant Public Service Company and the defendant, and that the defendant offered to make a ten-year contract covering the requirements of the complainant at High Point and Greensboro, but insisted that the rate should be at a higher schedule than was being charged other public utility companies and municipalities, and at a higher rate than it was and is charging the Southern Public Utilities Company, for like service, under its

contract expiring in 1944; and that the complainant declined to pay this higher rate, but agreed to sign the contract if the defendant would insert the following clause: "It is understood that the scale of rates herein stipulated is made subject to any decision or rule of the courts of Corporation Commission affecting rates" that the defendant declined to sign the contract with this provision inserted, and later advised complainant Public Service Company that it withdraw all offers to contract, and would not furnish it
481 current upon any terms; that it agreed by letter to continue to furnish current for twelve month- to give complainant an opportunity to make other arrangements; that before the expiration of this twelve months complainants instituted this action.

Eleventh. Because the Court failed to find as a fact, as prayed for by the complainants, from the admitted and undisputed facts in the pleadings, and from the uncontradicted evidence offered by the defendant, that the total amount of hydro-electric current generated and purchased by the defendant is over 700,000 kilowatt, and the amount sold to and consumed by the complainant is about 2% of this total; that the defendant generates in North Carolina more hydro-electric current than is consumed by all the municipalities and local public utility companies purchasing same from it for re-sale in the State of North Carolina.

Twelfth. Because the Court failed to find as a fact, as prayed for by the complainants, from the admitted and undisputed facts in the pleadings, and from the uncontradicted evidence offered by the defendant, that the contract with the Southern Public Utilities Company for the furnishing of current was made after the defendant connected its lines with the complainant Public Service Company and began furnishing it current at Salisbury, Greensboro, and High Point; that the defendant is now furnishing current for re-sale to other local Public utility companies operating at Hillsboro, Spray, Burlington, Graham and other places in North Carolina, as well as a number of points in South Carolina.

Thirteenth. Because the Court held and decreed "that the complainants have no legal right to require and compel the defendant to sell and deliver electricity to the complainant North Carolina Public Service Company, for re-sale and distribution by said North Carolina Public Service Company to the said Cities of Greensboro and High Point, and their citizens and inhabitants, and to other customers of said North Carolina Public Service Company, and that
482 the complainants are not entitled to have the defendant enjoined from discontinuing the sale and delivery of electricity to North Carolina Public Service Company for said use and purposes."

Fourteenth. Because the Court by its decree enjoined the complainants, their officers, attorneys, agents, employees and confederates and each of them, permanently from directly or indirectly prosecuting or proceeding further with this or any other suit, action or proceeding, embracing or involving the subject of this suit in the

Superior Court of Guilford County, North Carolina, or in any other Court.

Fifteenth. Because the Court by its decree ordered and adjudged that the complainants pay the cost of this suit.

Sixteenth. Because the Court failed to find and decreed that the defendant is a public service corporation, exercising the right of eminent domain, enjoying a monopoly in the ownership and control of the hydro-electric power developed in Western North Carolina and available to the complainants; that its property has been and is dedicated to selling numerous local public utilities operating in North and South Carolina, and to furnishing numerous municipalities in North and South Carolina, all of which is purchased for re-sale at retail in and adjacent to the municipalities served, and that the defendant shall continue to furnish complainants with the necessary electric energy to supply their requirements to meet the needs of the consuming public.

Seventeenth. Because the Court by its decree refused and denied to the complainants the relief and rights which they, upon the record and pleadings, as made up by the complainants and defendant, and the undisputed testimony taken in the case, were entitled to, to-wit: an order perpetually enjoining the defendant from discontinuing the service of electric energy to the complainant North Carolina Public Service Company at Greensboro and High Point for re-sale to said cities and the inhabitants thereof, and the consumers adjacent thereto, and commanding the defendant to continue such service upon such reasonable rules and regulations and at such rates as shall be made and prescribed by the North Carolina Corporation Commission.

483 & 484 Wherefore, The Complainants pray that the said decree be reversed, and the Circuit Court be instructed to enter such decree as is prayed for by the said complainants in their said bill. A. L. Brooks, King, Sapp & King, Chas. A. Hines, Dred Peacock, Solicitors.

Order to Transmit Record.

UNITED STATES OF AMERICA,
Western District of North Carolina:

In the U. S. District Court, at Greensboro.

And thereupon, it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereupon relating so far as the same is embraced in *Præcipes* of the Plaintiff and Defendant, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transferred accordingly.

Teste: R. L. Blaylock, Clerk U. S. Court.

Clerk's Certificate.

I, R. L. Blaylock, Clerk of the United States District Court for the Western District of North Carolina, at Greensboro, do hereby certify that the foregoing is a true and correct transcript according to Præcipes hereto attached as appears from the original papers and records in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at office in City of Greensboro, in said District, on this the 21st day of September, A. D. 1921. R. L. Blaylock, Clerk U. S. District Court. (Seal.)

485 Proceedings in the United States Circuit Court of Appeals, Fourth Circuit.

[Title omitted.]

September 22, 1921, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, appeal bond and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of A. L. Brooks, Chas. A. Hines and Dred Peacock is entered for the appellants.

September 24, 1921, the appearance of Wm. P. Bynum is entered for the appellee.

September 26, 1921, the appearance of Edwin T. Cansler and W. S. O'B. Robinson, Jr., is entered for the appellee.

486 Stipulation as to Briefs.

Filed October 3, 1921.

In the above-entitled case, it is agreed and stipulated that, whereas, This case is calendared for argument during the week beginning November 22nd, that the time for filing briefs may be enlarged, and the appellant is allowed until November 5th within which to file its brief, and the appellee is allowed until November 18th within which to file its brief; and this stipulation shall be filed with the Clerk of the Circuit Court of Appeals at Richmond. A. L. Brooks, Counsel for Appellant. Wm. P. Bynum, Counsel for Appellee.

This 29 Sept., 1921.

October 8, 1921, twenty-five copies of the printed record are filed.

November 1, 1921, the appearance of John W. Davis is entered for the appellants.

Argument of Cause.

November 22, 1921 (November Term, 1921), cause came on to be heard before Knapp, Woods and Waddill, Circuit Judges, and is argued by counsel and submitted.

487 **Order Extending Period of Six Months Allowed by District Court Requiring Appellee to Furnish Electricity to North Carolina Public Service Company.**

Filed and Entered December 28, 1921.

[Title omitted.]

Whereas, the decree of the court below contains the following: "further orders, adjudges and decrees that for and during the period of six months from the date of this decree the defendant shall continue to sell and deliver to the North Carolina Public Service Company electricity for the use and benefit of said cities of Greensboro and High Point and their citizens and inhabitants, and those in the vicinities of said cities, as they are now being served by said complainant, as the defendant has heretofore sold and delivered such electricity to said North Carolina Public Service Company."

488 And it appearing to the court that said six months will expire on December 29, 1921,

It is now here ordered that the said period of six months be, and the same is hereby extended, with the same terms and provisions, until the further order of this Court. Martin A. Knapp, Senior Circuit Judge. December 28, 1921.

Same day, to-wit, December 28, 1921, a certified copy of said order is transmitted to the U. S. District Court at Greensboro, N. C.

Opinion.

Filed May 10, 1922.

[Title omitted.]

489 (Argued November 22, 1921. Decided May 10, 1922.)

Before Knapp, Woods, and Waddill, Circuit Judges.

John W. Davis and Aubrey L. Brooks (King, Sapp & King, C. A. Hines and Dred Peacock on brief) for Appellants, and W. S. O'B. Robinson, Jr., and William P. Bynum (E. T. Cansler on brief) for Appellee.

WOODS, *Circuit Judge*: This action was commenced in the Superior Court of Guilford County, North Carolina, on September 3, 1920. The complaint alleged: ownership and operation by the plaintiff, North Carolina Public Service Company of a street railway system and of an electric light and power system furnishing light for the streets and private houses and operating the machinery of industrial enterprises in the cities of Greensboro and High Point, North Carolina, under municipal franchises; the ownership and operation

by the defendant, Southern Power Company, a New Jersey corporation, of large hydro-electric plants on the streams of the State of North Carolina and also steam plants, generating in the aggregate about 300,000 electric horse power, which it sells as a public service corporation to factories, municipalities and to other public corporations for resale; contracts by defendant with plaintiff, North Carolina Public Service Company, in December, 1909, and January, 1910, to furnish current necessary for its needs at Greensboro and High Point for the term of ten years; the refusal by the defendant to enter into a new contract to furnish North Carolina Public Service Company the electric current necessary for its plants except for a much shorter period and at a rate much in excess of the former charge and in excess of the rates charged for like services rendered to other purchasers under the same or substantially similar conditions; notice by defendant that it would cut off its current at Greensboro and High Point; the inability of the North Carolina Public Service Company and the cities of Greensboro and High Point to obtain current from any other source, and irreparable loss that would result to North Carolina Public Service Company and to the cities and their citizens from being deprived of light and power; the readiness of the North Carolina Public Service Company to pay any reasonable price for the current required, furnished without discrimination as to rates and service. The relief asked was mandamus to compel the Southern Power Company "to continue to furnish electric current and power to the Public Service Company through its sub-stations at Greensboro and High Point, to operate the street car lines in both said cities, and for the use and benefit of the municipalities and the citizens thereof for light and power, as is now being furnished."

On September 8, 1920, defendant filed a petition for removal to the United States District Court of the Western District of North Carolina, and on September 15, 1920, filed a transcript of the record in the federal court. The motion to remove was refused by the state court on the ground that under the allegations of the complaint "a writ of mandamus may properly issue" and, therefore, the United States District Court was without jurisdiction. On appeal the state Supreme Court affirmed the judgment, two of the justices dissenting. On October 23, 1920, defendant answered in the federal court. On December 13, 1920, the state court on the pleadings granted a judgment of mandamus as prayed for, requiring the Southern Power Company to furnish the necessary current and providing: "The rates and terms of payment for said electric current shall be such as now exist between plaintiff, North Carolina Public Service Company and defendant, or as same may hereafter be fixed and determined by the North Carolina Corporation Commission."

Pending appeal from this judgment to the state Supreme Court, plaintiffs moved in the United States District Court to remand the cause to the state court. The motion was refused, and subsequently the District Judge by order enjoined further proceedings in the state court. At the trial the federal court, after refusing plaintiffs' motion for judgment on the pleadings, heard

testimony and decreed that the plaintiffs had no right to require the Southern Power Company to furnish current to the North Carolina Public Service Company for resale to the cities of Greensboro and High Point or to its other customers; that the North Carolina Public Service Company did have the right to require such service for its motive power in operating its street railway system in Greensboro and High Point; that to prevent the great loss and inconvenience which would result from the sudden stoppage of the service Southern Power Company should continue to furnish the current as theretofore for the period of six months upon terms specified in the decree.

Error is assigned in refusing to remand the cause and in enjoining further proceedings in the state court. The District Court of the United States has no original jurisdiction in mandamus and, therefore, a mandamus proceeding is not removable. *Rosebaum v. Bauer*, 120 U. S. 450. In our opinion, however, the complaint stated a case for which injunction, not mandamus, was the proper remedy. The office of mandamus is to compel the performance of a plain and positive duty. It is never granted in anticipation of an omission of duty, but only after actual default. Injunction is the proper remedy for threatened violation of a duty entailing an injury for which the law gives no adequate compensation. *Board of Liquidation v. McComb*, 92 U. S. 531; *Ex parte Cutting*, 94 U. S. 14. The numerous authorities distinguishing the two remedies are set out in the opinions in *North Carolina Public Service Co. v. Southern Power Co.*, 180 N. C. 335; 104 S. E. 872. The complaint alleges that defendant had notified North Carolina Public Service Company that it would cut off its current at the termination of the contract, not that defendant had already done so. It seems to us therefore that the suit was actually for injunction against threatened injury. Being a suit of a civil nature in equity, no state practice or statute or adjudication could deprive a citizen of another state of his right to have it tried by the courts

of the United States. *Barrow v. Hunton*, 99 U. S. 80; *Mississippi Mills v. Cohn*, 150 U. S. 202; *Smyth v. Ames*, 169 U. S. 406; *Harrison v. St. Louis & San Francisco R. R.*, 232 U. S. 318; *C. & O. Ry. Co. v. McCabe*, 213 U. S. 207, 217; *Colleton M. & M. Co. v. Savannah River Lumber Co.* (4th Circuit) — Fed. —.

Upon the filing of the record in the federal court on September 15, 1920, that court acquired jurisdiction of the question of removability and with it the power to protect its jurisdiction by injunction. Any action thereafter taken by the state court was subject to the exercise by the federal court of its jurisdiction to decide the question of removability. *C. & O. Ry. Co. v. McCabe*, 213 U. S. 217. It follows that the decree of the Supreme Court of North Carolina on November 10, 1920, holding the cause not removable, was not res judicata between the parties and was in no way binding on the District Court. The District Court was therefore right in refusing to remand the cause and in enjoining further proceedings in the state court.

On the merits the question is whether under the pleadings and proof the Southern Power Company, as a public service corporation,

owes the duty to the North Carolina Public Service Company to furnish electric current on any terms for street lights, the lights in private dwellings, and power for the manufacturing plants which the North Carolina Public Service Company has contracted with the cities of Greensboro and High Point and manufacturing plants to furnish.

The Southern Power Company by its charter is authorized, among other things, "to buy, sell, operate or lease pole lines, erect poles, string wires thereon, or on poles of other individuals or corporations * * * and to use the same, either for the transmission of electric current for delivery to consumers on such lines, or for transmission of current to independent vendors thereof, and to sell or lease to other individuals or corporations the right to string wires on or attach electric wires to any or all poles so erected, owned or leased, and to use such lines, both as through lines and for local delivery."

In its answer the defendant admits that it has, in a few instances, entered into special contracts with other public service companies to sell them limited quantities of electricity at the prices and for the periods and upon the terms and conditions stated in such special contracts; that in August, 1908, it entered into a contract with the Salisbury and Spencer Railway Company, and that about 1914 it entered into a contract with the Southern Public Utilities Company for the sale of electricity to it, which electricity said Public Utilities Company is reselling for domestic light and power purposes. But it denies that it has in any way dedicated its property or business to the use or purpose of selling electricity to other public service corporations for resale and distribution.

By the law of North Carolina hydro-electric companies are declared to be public service corporations subject to the laws of the state regulating public service corporations and under the control of the Corporation Commission of the state. Consolidated Stat. 1035. Section 1054 provides:

"The Corporation Commission shall make reasonable and just rules and regulations to prevent discrimination in the transportation of freight and passengers, or in furnishing electricity, electric light, current, power or gas."

The right of eminent domain is conferred by statute on electric power and light companies.

Both sides rely on the decisions of the North Carolina Supreme Court in *Salisbury & Spencer Ry. Co. v. Southern Power Co.*, 101 S. E. 593; 102 S. E. 625; 105 S. E. 28, and in *Public Service Co. v. Power Co.*, 179 N. C. 330; 107 S. E. 226. Inasmuch as these cases were decided on demurrer or motion without a hearing on the testimony, and therefore do not present precisely the facts before us, the decisions are not binding authorities.

The Southern Power Company has exercised under state authority the power of eminent domain and has constructed about 1,500 miles of transmission lines and has developed about 60,000 horse power of hydro-electric current. Its lines are connected with the Georgia Railway & Power Company, which is in turn connected with other

large producers of hydro-electric power, and from this source
494 Southern Power Company gets over 11,000,000 kilowatts a year. The Southern Power Company and these connected companies own and control all the hydro-electric power now developed and available to the region of the country in which the cities of Greensboro and High Point are situated. It is true that the water power of the state of North Carolina is estimated to be capable of producing electric power of 1,095,000 horse power. Consideration is to be given to future possibilities, including the possibility of the plaintiffs acquiring and developing water power for their own use. But an important factor in that consideration is the deterring fear which others must have of being unable to compete in a field so largely pre-empted by the Southern Power Company, a corporation rich in resources and experience. If others hereafter enter the field with the great resources adequate to compete in the production and sale of hydro-electric power, it may be that the courts would then deal with such questions as are now before us with the element of exclusive control eliminated. We are now dealing with the present condition, and that condition is that the Southern Power Company and the companies with which it connects have control of the generation and sale of hydro-electric power which is available to the North Carolina Public Service Company and the cities of Greensboro and High Point, and other independent vendors and cities and towns in like situation, except in so far as it is subject to regulation by the North Carolina Public Service Commission.

The great advantage in economy and convenience of hydro-electric power over power generated by steam, the failing competition of steam power and the general substitution of hydro-electric power for it, appear from the record.

The right of eminent domain could not have been conferred on the defendant except in consideration of the service to the public expected of it in the exercise of the charter powers granted. This power of eminent domain cannot be separated from the duties assumed by the corporation. Exercising this right to carry its lines and power

anywhere in the state by condemnation, the defendant has
495 carried them to cities and towns and has there made contracts with other public service corporations under its charter power to use its property for "transmission of current to independent vendors thereof." Among these independent vendors furnished with current is the Southern Public Utilities Company. This company is nothing more than an off-shoot of the Southern Power Company, controlled by it and with the same stockholders. It has made contracts with the Southern Public Utilities Company to furnish it current at a rate materially lower than that demanded of the North Carolina Public Service Company.

In this skeleton statement we have intentionally omitted all subordinate and incidental facts peculiar to this case—such as the dismantling of one of the steam plants of the North Carolina Public Service Company in reliance on defendant's current, and the negotiations between the parties—because it seems vital to the in-

terest of the parties and the public that we should directly meet the propositions laid down by the Southern Power Company, namely: That, under the facts stated, it owes no public service "of transmission of current to independent vendors thereof"; that as to such service it is not subject to rules and regulations of the State Corporation Commission; that it may furnish one or many of these independent vendors to cities and towns to the exclusion of others; that it may refuse to furnish current on any terms to cities and towns themselves to be resold to their inhabitants; that it has absolute freedom of contract to discriminate in price and terms between all independent vendors, including cities and towns; that it has the right to create its own subordinate "independent vendor", Southern Public Utilities Company, and refuse to deal with any other on equal terms or on any terms.

Defendant's claim thus stated in its nakedness is based on the assertion of fact that the North Carolina Public Service Company and other independent vendors are competitors in business of the Southern Power Company, and on the legal contention that as such competitors they are not entitled to claim service as parts of the public—that in respect to independent vendors of current the North Carolina Corporation Commission has no power to regulate rates.

496 If the Southern Power Company and the North Carolina Public Service Company are competitors at all, they are so in a restricted sense. It is true the Southern Power Company has been serving some towns and their inhabitants and factories in the same way that the North Carolina Public Service Company serves Greensboro and High Point and their inhabitants and factories. But it appears from the testimony of Mr. Lee, Vice-President of Southern Power Company, that in these instances it has turned over its property and contracts to Southern Public Utilities Company, which company purchases current from the parent company. It is true it bid in its own name for the contract to furnish current to the cities of Greensboro and High Point, but it seems fair to infer that in pursuance of its general policy these contracts would have been turned over to Southern Public Utilities Company. At all events we think the evidence admits of no other inference than that the policy and aim of the Southern Power Company is to furnish current directly to municipalities only through its own "independent vendor", Southern Public Utilities Company. This leaves Southern Power Company exercising its corporate powers mainly if not entirely for the wholesale manufacture and sale of hydro-electric current. It is true that North Carolina Public Service Company does furnish current to contiguous factories and in this restricted sense it may be a competitor of Southern Power Company, but it is not a competitor in the general manufacture, sale and distribution of current. In the business of furnishing light and power to cities and towns and their inhabitants the real competition of North Carolina Public Service Company and other independent vendors is not with Southern Power Company exercising its corporate powers but with Southern Public Utilities Company exercising its separate corporate powers.

And the ultimate issue is whether Southern Power Company shall be allowed to destroy the really independent public service corporations and thus smother competition, to the great detriment of the public, by discrimination in favor of one of the competitors.

There is high authority for the general proposition of law
497 that one competitor in business cannot demand service of another in promotion of its business⁽¹⁾.

But when a corporation has definitely undertaken an entered upon a particular service authorized by a charter, which confers the right of eminent domain, the obligation to perform the service is complete, its rates and terms are subject to regulation by public authority, and it must serve all alike. In such public service it cannot pick and choose its customers. The principle is applied under varying conditions by the authorities cited in the margin².

In this instance the Southern Power Company has definitely undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter, and for that purpose has exercised the power of eminent domain conferred by the state. It cannot now be heard to say that it owes no public duty with respect to that service, and that it may pick and choose its customers, and arbitrarily discriminate among them.

The Supreme Court cases relied on by the defendant are not controlling. In *The Express Company Cases*, 117 U. S. 1, the basis of
498 the decision is that the railway companies never held themselves out as public service corporations in the sense of furnishing accommodation to other carriers who might wish to do an independent business on their lines. The court pointed out that such general service to all express companies applying for it is rendered impossible by the nature of the business. In *Louisville & Nashville R. R. Co. v. West Coast Navy Stores Co.*, 198 U. S. 483, the court held that the public was not entitled to use as a public

¹ *Evansville Traction Co. v. Henderson Bridge Co.*, 134 Fed. 973; *Pacific Telephone Co. v. Anderson*, 196 Fed. 703; *Home Telephone Co. v. Sarcoxie Light & Telephone Co.*, 139 S. W. 108; 236 Mo. 114; *Lundquist v. Grand Trunk W. Ry. Co.*, 121 Fed. 915; *Jacobson v. Wisconsin R. R. Co.*, 71 Minn. 519; 74 N. W. 893; 40 L. R. A. 389; 70 Am. St. R. 358; *Central Stock Yards Co. v. Louisville & Nashville Ry.*, 192 U. S. 568.

² *N. Y. & Queens Gas Co. v. McCall*, 24 U. S. 345; *Lumbard v. Stearns*, 4 Cush. 60; *Munn v. Illinois*, 94 U. S. 113, 126; *Mason v. Consumers Power Co.*, 119 Minn. 225; 137 N. W. 1104; 41 L. R. A. (N. S.) 1181; *Hangen v. Albina Light & Water Co.*, 21 Ore. 411; 28 Pac. 244, 14 L. R. A. 424; *New Orleans Gas Co. v. La. Light Co.*, 115 U. S. 650; *Western Union Tel. Co. v. Public Service Commission*, 230 N. Y. 95; 129 N. E. 220; *U. S. Telephone Co. v. Central Union Telephone Co.*, 171 Fed. 130, 144; *U. S. Tel. Co. v. Central Union Tel. Co.*, 202 Fed. 66; *Clarksburg Light & Heat Co. v. Public Service Commission*, — W. Va., —, 100 S. E. 551, 554; *Postal Cable Telegraph Co. v. Cumberland Tel. & Tel.*, 177 Fed. 726; *Pinney v. Los Angeles Co.*, 141 Pac. 620 (Cal.) L. R. A. 1915C, p. 282; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 404; *Morawetz on Private Corporations*, Sec. 1129; 12 A. L. R. 960; *State v. Skagit R. T. Co.*, 85 Wash. 29; 147 Pac. 885; 151 Pac. 1122.

terminal for the delivery of freight a wharf built by the railway company over the water; putting the decision expressly on the ground that the wharf was built exclusively for the use of the railroad and had never been dedicated to a public use as a public terminal. The distinction is pointed out by this court in *Baker-Whiteley Coal Co. v. B. & O. R. R. Co.*, 188 Fed. 410. *Donovan v. Pennsylvania Co.*, 199 U. S. 279, decided that a railroad company has a right to contract with one transfer company to furnish cabs for the use of passengers and exclude other cabmen from its premises. But the decision was on the ground that the business of the railroad was to carry and provide for the convenience of passengers, that it had undertaken and owned no public duty to cabmen and therefore had the right to exclude them from its station so long as such exclusion did not interfere with the reasonable accommodation of passengers.

The Southern Power Company has conferred great benefits on the public in developing water power which before was running to waste. For their enterprise and ability those who have invested in it and successfully managed it are entitled to liberal compensation.

Yet development of this great natural resource connotes the
499 possibility of power of accumulation and destruction which no free people can allow to go unchecked in any direction or in any form of application. The people of North Carolina have explicitly provided for control and regulation of this power in very comprehensive terms and it is not for the courts to defeat or emasculate that control and regulation by holding that it does not apply to one of the chief corporate activities of the Power Company. The corporation asked and received of the public the right of eminent domain, and the right to sell its current to independent vendors which in turn furnish many towns and cities and thousands of homes and places of business in the state. It has used these rights and is still using them. That the public has a most vital interest in their exercise seems plain beyond discussion. To state the claim now made—that the corporation can continue to exercise these powers bestowed by the public, without responsibility to the public, arbitrarily discriminating in rates—is to reject it.

Apply the practical test to the position that the defendant is not a public service corporation except as to actual consumers: It would then be under obligation to furnish current without discrimination to cities for their street lights and to provide water used for fire engines and street cleaning, but not for lights or water furnished by the city to private houses. As to these latter it could charge a city any price it pleased or deny to cities power to provide them altogether. It would be under obligation to furnish power to an independent corporation for its street railway, but not for street lights or water for fire engine which it had contracted to provide for a city, or for water and lights for private dwellings and places of business. It would be under obligation to furnish manufacturers power to run their machinery, but not to furnish water and lights to their operatives.

The vital importance to the public economy and convenience that in the same city all these necessities should be directly supplied by the

city itself, or by one corporation, is obvious. If the position taken by the Southern Power Company is sustained it will achieve this practical result: It will continue to discriminate in favor of the Southern Public Utilities Company by contracting with that corporation to the exclusion of other independent vendors, thus 500 conferring upon it the control of the resale to consumers of hydro-electric power, to the detriment of the general public and the ruin of other independent vendors of hydro-electric power. Nothing short of direct controlling authority could induce us to assent to a result so restrictive of the North Carolina statute. We think there is no such authority.

An adjudication supporting the position of the Southern Power Company—that in its relations with independent vendors of current it is not a public service corporation, is under no public duty, and that its contracts are matters of purely private concern—would have grave consequences to that corporation itself. A city of North Carolina makes a contract with an independent corporation to furnish it hydro-electric current. The Southern Power Company in turn contracts to furnish current to that independent corporation. When the Southern Power Company undertakes to condemn a right of way for its lines of transmission to the designated city it will find itself confronted by the contention that it could acquire no right of condemnation in the prosecution of a purely private business. We can discern no answer it would have to the contention, for it is elementary that the legislature cannot confer a right of eminent domain to take private property for a purely private use. *Cozad v. Kanawha Hardwood Co.*, 139 N. C. 283; 51 S. E. 932; 111 A. S. R. 779; *Walker v. Shaste Power Co.*, 160 Fed. 856; *Salisbury P. & M. Co. v. Alexander*, 101 Va. 98; 43 S. E. 194; 99 A. S. R. 855; 10 R. C. L. 40; *Wyman on Public Service Corporations*, Sec. 226 and citations.

Lay aside these arguments for the moment and consider the plain language of the North Carolina statute. It requires the Corporation Commission to "make reasonable and just rules and regulations to prevent discrimination * * * in furnishing electricity, electric light, current, power or gas." To sustain defendant's contention the court would have to insert express limiting words in the statute which the legislature saw fit to omit. There is not a word in the statute to suggest that the legislature meant to impose the duty and power on the commission for the protection of consumers 501 only, leaving others to whom current might be furnished without protection from discrimination. Surely the court has no power to say that the legislature meant to provide a limitation which it refrained from expressing, namely, that furnishing current or power to independent vendors was not furnishing current or power within the unlimited terms of the statute.

It is important to remember that under its charter Southern Power Company had been given authority by statute to sell to independent vendors. Its right of eminent domain was also conferred by statute. If the defendant's contention be sound the Southern Power Company could have carried its lines over the entire state by condemnation. After it had done so it could have furnished current

to independent vendors; and then successfully claimed exemption from all regulations by the Corporation Commission of its entire business on the ground that the statute did not contemplate the prevention of discrimination in all current furnished, but only current furnished to actual consumers. Thus it would have availed itself of the state's power of eminent domain and escaped all regulations of its business by the state.

It is our opinion that the decree of the District Court should be modified, and a decree entered enjoining the Southern Power Company from its threatened violation of duty to furnish hydro-electric power to the plaintiff, North Carolina Public Service Company, for resale and distribution at High Point and Greensboro, substantially as heretofore, without unjust discrimination in rates.

All payments made to the Southern Power Company by the North Carolina Public Service Company will be adjusted in the District Court in accordance with this opinion. The rates and terms upon which current is furnished to the North Carolina Public Service Company and other corporations doing like business are, of course, subject to the rules and regulations of the North Carolina Corporation Commission.

Modified.

WADDILL, *Circuit Judge*, dissenting: On the 21st day of November, 1908, the Southern Power Company, Appellee, entered
502 into a contract with the High Point Electric Company to sell it electricity for redistribution in the city of High Point, for the period of ten years, and on the 23rd day of December, 1908, likewise entered into a contract with the Greensboro Electric Company to sell it electricity for redistribution in the city of Greensboro, for the period of ten years. In 1909, the North Carolina Public Service Company, appellant, was chartered under the laws of North Carolina, and thereafter acquired the property and franchises of the High Point Electric Company and the Greensboro Electric Company, and had assigned to it the rights of those companies under their contracts aforesaid, with the Southern Power Company. Under its charter, the North Carolina Public Service Company was authorized to secure, develop and operate hydroelectric companies, and to generate electricity, and sell and distribute it. Its powers in this respect were the same as those possessed by appellee, the Southern Power Company, and it was authorized to purchase the privileges and franchises of any other corporation doing an electric lighting, electric power, street car or gas business, either for public or private use, or its own use for distribution and sale to others, and in the conduct of its business, the said Public Service Company sold and distributed electricity that had been purchased from the appellee, in competition with the appellee.

Prior to the expiration of the ten year periods named in said contracts, negotiations were had looking to the renewal of the same, but nothing substantial was accomplished by those efforts. The appellee offered to renew the contracts at the then established rate,

and at which it was then selling power to other customers, under substantially similar conditions, being an advance of one mill per kilowatt hour over the price it was furnishing power to the town of Charlotte through the Southern Utilities Company, under a contract made prior to the expiration of the ten year period aforesaid, expiring in the year 1944. The advance in price was made necessary by reason of the very substantial increase in the cost and expense of generating and distributing electricity. This offer was declined, and pending the period during which appellee was temporarily furnishing power to avoid inconvenience to the public, after the expiration of the contracts aforesaid, the bill in this cause was filed to prevent the appellee from discontinuing the service, and to require it to continue to furnish power to said two cities and their citizens through the North Carolina Public Service Company.

The case as thus presented, is a simple one, viz: whether appellee can be required, in the absence of a contract, to furnish appellant, the North Carolina Public Service Company, a competitor, with power, to enable the latter company to sell the same to the cities of High Point and Greensboro, and the citizens of said two cities, in competition with appellee.

Appellee insists that having made the contracts in question for a specified time, it did not thereby, or by any other act on its part, dedicate the use of its power to the public, or in any other manner. On the contrary, it indicated its intention not to do so, and entered into the contracts for the use of this power in the two cities, only for the limited periods covered by the contracts, and the contracts in terms specified that at the time of their termination, the appellee should have the right to discontinue supplying the electricity therein contracted for.

Appellee Power Company does not deny that the cities in question, and their inhabitants, as consumers, have the right to call upon it to supply such power as may be within its ability to furnish; but it insists that it can not be required to furnish power to the appellant Public Service Company for resale to the said two cities and their inhabitants, in competition with itself. It is this latter demand that is the vital issue in this case, and unless the contracts entered into by the two companies acquired by the appellant public service company, and both of which have long since expired, or some other act on its part constitutes a dedication of its right to sell electricity to the public, and thereby enabled the appellant public service company and other similar companies to call upon it to furnish power for resale and distribution, in competition with itself, confessedly no such right exists.

In my opinion it is entirely clear that no such dedication was made by the appellee power company, and at the expiration of the contracts with said two companies, it had the undoubted right to decline to renew the same, although the obligation to furnish electricity to the two cities for their lawful corporate purposes, and to their inhabitants as consumers, to the extent of their ability, at reasonable and lawful rates, to be prescribed by the Cor-

poration Commission of the State of North Carolina, necessarily followed.

The principles involved in this case are of far-reaching importance, indeed, could hardly be of more serious concern to one engaged in the maintenance and operation of a public service corporation, charged with the obligation and duty to render efficient service to the public at reasonable remuneration. Appellee's business is sustained by its receipts from the sale of its power to its customers; and if the appellant, its direct competitor, engaged in the same business, can call upon appellee to furnish to it power to resell in competition with what it produces, how long could any business withstand such a strain? In the end the public would suffer, as no well organized and strong business could long provide against the disastrous consequences that would necessarily flow from such unbusinesslike and chaotic conditions. To be wholly without means, would place one in quite as good, if not a better position than that of great strength, since it could secure without risk the benefits of the labor and capital of the strong until the latter was destroyed. A more dangerous blow could not well be struck at vested interests, and one that would be eventually result in withholding capital necessary to start or maintain enterprises requiring large outlay. Authorities to support this position can be cited almost without number. Only a few need to be given. *Memphis & Little Rock R. R. Co. vs. Southern Express Co.*, 117 U. S. 1, 29 L. Ed. 791; *Evansville & H. Traction Co. vs. Henderson Bridge Co.*, 134 Fed. 973; *Express Co. v. Railroad*, 111 N. C. 463; *Elliott on Railroads*, sec. 922, 974 and 1084; *People ex rel. Oneida Tel. Co. v. Central Tel. Co.*, 41 N. Y. App. Div. 19; *Home Telephone Co. v. Sarcoxie Light & Tel. Co.*, 139 S. W. 108.

In the majority opinion, the transactions between the appellee and the Southern Public Utilities Company, in the matter
505 of sales of power to the latter company, is largely made the basis for the conclusion reached, which, in effect, holds that appellee company has so dedicated its rights to sell electric power, as to entitle complainant, the North Carolina Public Service Company, to the relief it seeks, and that it is estopped from interposing the defenses made here to the claim of the appellant, the North Carolina Public Service Company. Of course the appellee could have so conducted its business as to have dedicated its rights and privileges under its charter, to manufacture and furnish electricity to the public generally, in which event it would not be heard to decline to furnish the same to the appellant as one of the public, for resale to the two cities involved here. But if anything is manifest in this case, as well from the pleadings and proofs as from the findings of the lower court, it is that no such dedication has ever been or was intended to be made. On the contrary, appellee company has at all times carefully in terms so contracted as to be relieved from the implication of any such folly as it would have been guilty of, had it transferred its vast business interests from its own stockholders for the benefit of the public. I find myself so far out of accord with the findings, reasonings, and conclusions, arrived at by my brethren,

as at all applicable to the facts of this case, that it is difficult for me, perhaps, to properly appreciate them. I might readily agree as to many of the positions taken, if I could bring myself to believe that the condition of affairs described by them in point of fact, exists. But I can not, and suffice it to say that in this, as in all other litigation, we have to look to the pleadings and proofs to finally and intelligently ascertain just what are the merits of the case. So far as the transactions with the Southern Public Utilities Corporation, so much relied on, are concerned, as well as in respect to several other minor transactions with the other companies, the complainant's case is elaborately set up in its bill, and the appellee in its answer, made full and detailed explanation and denials in respect thereto. Upon the issue thus joined, the cause was heard, proofs taken orally under the new equity rules before the judge of the district court, and upon full and elaborate hearing and arguments of counsel, that court reached its conclusions and made 506 its findings, fully sustaining the appellee's contentions, against those of the complainant, the appellant. Upon the case thus heard and disposed of, and the findings and conclusions reached, this dissent is based. The contract entered into between the appellee, Southern Power Company, and the Southern Public Utilities Company, would in no event operate to dedicate the appellee's right to sell its power to the public as claimed, or prevent it from making lawful contracts with other persons or corporations in respect thereto, or to refuse to make such contracts. *Memphis & Little Rock R. R. Co. v. Southern Express Co.*, supra, 117 U. S. 1, 29 L. Ed. 791; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 50 L. Ed. 192; *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 51 Fed. 465; *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 63 Fed. 775; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. Co.*, 73 Fed. 438; *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 664.

In considering the subject, sight should not be lost of the fact that the appellee is in no sense or manner to be relieved of its full obligation and duty to serve all the public alike, upon just remuneration being paid. But appellant, a public service corporation, is not one of the general public, in the sense of a consumer. On the contrary, it is a competitor in business as a public service corporation, without the ability to produce electricity for sale, trying to engraft itself on the appellee, with a view of securing its power, in order that it may deal in and resell the same in competition with the producer.

The equities of the case are clearly with the appellee. The appellant has all to make, and nothing to lose by the success of the litigation, since it is seeking to avail itself of the right to use the appellee's franchise in competition with it; whereas, in the case of the appellee, the situation is entirely different, in that it secured its charter to do business and is so engaged upon an extended scale, and at great expense, and is dependent upon having secured to it the rights given to it by its charter, to lawfully sell its output to its customers, without let or hindrance on the part of others, who have no interest therein,

except to avail itself of its rights and privileges and franchises.

507 The decision of the majority will operate to deprive appellee of its property, without just compensation made therefor, and without according to it due process of law under the Fourteenth Amendment to the Constitution of the United States, as it will also deny to it the equal protection of the laws as guaranteed therein. *Atchison T. & S. F. R. R. Co. v. Denver & New Orleans R. R. Co.*, 110 U. S. 667; *Memphis & Little Rock R. R. Co. v. Southern Express Co.*, *supra*, 117 U. S. 1; *L. & N. R. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 53 L. Ed. 151; *Lewis on Eminent Domain* (3rd ed.), sec. 440.

So far as appellants, the cities of Greensboro and High Point are concerned, they are in no better or worse positions than they would be in respect to any other corporate matter in which they insisted upon making contracts with persons who had no means of performing the particular undertakings, instead of with those who are able to comply with their contracts, and who by law are under obligation to do so.

The decision of the lower court, in my judgment should be affirmed.

Decree.

[Filed and Entered May 11, 1922.]

[Title omitted.]

Appeal from the District Court of the United States for the Western District of North Carolina.

508 This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, modified as set forth in the opinion of the Court filed herein; that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of North Carolina, at Greensboro, for further proceedings in accordance with the opinion of this Court; and that the costs in this Court be paid by the appellee. C. A. Woods, U. S. Circuit Judge. May 11, 1922.

Petition of Appellee for Enlargement of Time to Present Petition for Rehearing and for Stay of Mandate.

[Filed May 31, 1922.]

To the Honorable United States Circuit Court of Appeals for the Fourth Circuit:

The petition of the Southern Power Company, appellee in the above entitled cause, respectfully shows unto this Honorable Court that, being aggrieved by the decree entered in this cause on the 11th day of May, A. D. 1922, by which it was ordered and directed that the decree of the United States District Court, for the Western District of North Carolina, originally entered herein, be modified to the end that your petitioner be required to continue to furnish hydro-electric power to the North Carolina Public Service Company for resale and distribution at High Point and Greensboro, in the State of North Carolina, it is desirous of filing a petition for a rehearing of this cause by this Honorable Court, and respectfully requests that it be allowed thirty (30) days within which to
509 file such petition, and that the mandate of this Court be stayed, pending the filing of said petition to rehear and the disposition thereof, by this Honorable Court.

Your petitioner further shows unto the Court that no injury or harm can come to the North Carolina Public Service Company, the City of Greensboro, or the City of High Point, appellants herein, because of the stay of the mandate in this cause, or the granting of leave to file a petition for a rehearing, for the reason that your petitioner is now furnishing hydro-electric power to the plaintiff, North Carolina Public Service Company, for resale and distribution at Greensboro and High Point under the orders heretofore made in this cause, and will continue to furnish the same until further orders be made in the premises.

Wherefore, your petitioner prays that this Honorable Court will stay the mandate in this cause and will allow a thirty (30) days within which to file a petition for a rehearing of this cause, submitting itself to such orders as the Court may make if said petition for a rehearing be held to be without merit.

Respectfully submitted this 31st day of May, 1922. W. P. Bynum, E. T. Cansler, W. S. O'B. Robinson, Jr., Attorneys for the Southern Power Company, Petitioner.

510 Order Enlarging Time Within Which to Present Petition for Rehearing and Staying Mandate.

[Filed and Entered May 31, 1922.]

[Title omitted.]

Upon the application of the Appellee, by its counsel, for an enlargement of the time within which to present a petition for a rehearing and for a stay of the mandate,

Upon consideration whereof, leave is hereby granted the Appellee to present a petition for a rehearing at any time within 20 days from this date.

And it is ordered, that the issuance of the mandate in this case, be, and the same is hereby, stayed pending the action of the Court upon the petition for the rehearing, provided said petition is presented within 20 days from this date.
C. A. Woods, U. S. Circuit Judge. May 31, 1922.

Petition of Appellee for a Rehearing.

[Presented June 15, 1922.]

513

[Title omitted.]

To the United States Circuit Court of Appeals for the Fourth Circuit:

514

The petition of the Southern Power Company, Appellee in the above entitled cause, respectfully shows unto the court:

That the above entitled cause came on regularly to be heard before this Court upon an appeal from the district Court for the Western District of North Carolina, and the decision of this Court was rendered on the 10th day of May, A. D., 1922. The District Court, in its decree, found as a fact that your petitioner, admittedly a public service corporation under the laws of North Carolina, engaged in the business of selling electricity to the public, had never dedicated its property to the use of selling electricity to other public service corporations for resale and distribution by such corporations, and that appellant, North Carolina Public Service Company, also admittedly a public service corporation chartered under the laws of the State of North Carolina, with powers similar to those of petitioner, and likewise engaged in the sale of electricity to the public, had no legal right to require and compel petitioner to sell and deliver electricity to it for resale and distribution to the public.

This Court, by its decision, from which Judge Waddill dissented, held that the decree of the District Court should be modified, and that a decree should be entered enjoining your petitioner from discontinuing the furnishing of electricity to the North Carolina Public Service Company for resale and distribution at High Point and Greensboro.

Your Petitioner respectfully prays for a rehearing of this cause upon the following grounds:

The Court apparently misconceived the real issue presented upon this appeal.

We submit that the only issue upon this appeal is whether petitioner, in the absence of contract, owes to other similar public service corporations the duty of furnishing to them electricity for resale and distribution to the public at a profit, and in competition with petitioner, in derogation of petitioner's asserted right to distribute its own electricity to the public through its own instrumentalities or instrumentalities of its own selection.

Petitioner contends that so long as it adequately serves the public at just and reasonable rates, without discrimination, and subject to the full regulatory power of the State over it as a public service corporation, that it is entitled to select its own instrumentality for rendering such service, and that it owes to no other public service corporation the duty to use such other corporation as an instrumentality in discharging its corporate functions, nor can it be compelled to give over its property to other competitive public service corporations for resale at a profit, in competition with petitioner.

Admittedly the issue is a grave one, and its correct solution is, as stated in the opinion of the court, "vital to the interest of the parties and the public."

We apprehend, therefore, that if it be made to appear that the decision of this Court was based upon a misapprehension of material facts, with the result that the real issue involved has been either misconceived or overlooked, that the Court will unhesitatingly grant a rehearing of the cause, and it is for this reason and upon this ground mainly that this petition for a rehearing is presented.

In stating that one of the propositions sought to be maintained by petitioner was "That it has absolute freedom of contract to discriminate in price and terms between all independent vendors, including cities and towns" (page 9 of the opinion), The

516 Court overlooked petitioner's admission that the rate making power of the Corporation Commission of North Carolina extends to all its rates, and that petitioner does not claim the right to discriminate in rates; and the Court apparently failed to recognize the distinction between the admitted power of the state to regulate the rates of a Public Service Corporation and the power to compel such a corporation, against its will, to give over its property to another competitive corporation for resale at a profit, or to adopt a competitor as an agency for serving the public.

Petitioner has never contended that it has the right to discriminate in rates. Such a contention would be entirely aside from the issue involved in this case, because, the issue here involved is judicial in its nature, namely, whether under the facts of the case petitioner owes to other competitive public service corporations the duty to furnish them electricity to resell to the public at a profit; while the power to fix rates and to prescribe rules and regulations to prevent discrimination by public service corporations involves the exercise of legislative or administrative functions, which, under the law of North Carolina are vested in the Corporation Commission.

The Corporation Commission has full power to regulate petitioner's rates for the sale of electricity, and it is unhesitatingly conceded that this rate making power extends to all rates, including the sale of electricity by special contract to other public service corporations, for instance, the sales by petitioner to the Southern Public Utilities Company.

This must necessarily be true for two reasons: First, the rate making power of the State could not be effectively exercised
517 so as to secure fair and reasonable rates to the public and at the same time allow a reasonable return to the public utility,

unless it did extend to all sales of its product by such public utility whether made to the consuming public in the prosecution of its public calling, or made to other public service corporations by private contract. Secondly, the public has a vital concern in seeing that its interests are not injuriously affected by private contracts entered into between two public service corporations, the terms of which directly affect the price ultimately to be paid by the public for the service it receives. A public utility cannot, by interjecting a middle man between itself and the public, unduly increase the price of its commodity to the public.

The power to regulate contracts after they have been voluntarily entered into between two public service corporations is one thing: the power of regulation; the right to compel a corporation to enter into such a contract is another thing: an act of ownership. Because the State has the power to regulate contracts voluntarily entered into between two public service corporations, it does not follow that it may compel one public service corporation, against its will, to enter into a contract to turn its property over to another for resale at a profit. The State may regulate the agencies voluntarily selected by a public service corporation, but neither the State nor the courts can select agencies for it.

"But broad as is the power of regulation, the State does not enjoy the freedom of an owner." (*Northern P. R. Co. vs. North Dakota*, 236 U. S. 585, 595.)

Petitioner does not deny that it is a public service corporation, and must serve the public at fair and reasonable rates, without discrimination, and under the full regulatory power of the State. It does maintain that it cannot be compelled against its will to turn its property over to another competitive public service corporation for resale to the public at a profit.

518 In stating that it is one of the contentions of petitioner "that it may refuse to furnish current on any terms to cities and towns themselves, to be resold to their inhabitants" (page 9 of the opinion), the court overlooked petitioner's contention to the exact contrary, as set forth in the pleadings, the evidence, and the argument presented on behalf of petitioner.

The complaint sets forth in part petitioner's letter to the City of Greensboro, written before the institution of this action. We quote from page 12 of the record:

"Your petitioner recognizes its obligation to furnish your city and its citizens whatever electricity shall be needed for municipal and domestic consumption in preference to its customers, who only need, or use, the same for industrial purposes, providing your Honorable Board will grant it a franchise to enable it to discharge this public duty or obligations; as it claims, and hereby asserts, the right to render such service directly to the city and citizens of Greensboro, to whom alone it is responsible, and not through the medium of the North Carolina Public Service Company, to whom it owes no duty whatever."

We quote from petitioner's answer, page 60 of the record:

"That this defendant is now and was at and before the institution of this action and ever since has been ready and willing to sell and distribute to the City of Greensboro and to the City of High Point and to the citizens and inhabitants of each of said Cities, and to the consumers of power and current in each, electric power and current and to fully and adequately serve the needs and requirements of each of said cities, and of the citizens and inhabitants of each and of the consumers of power in each, to the limit of its ability, at fair and reasonable rates, and under just rules and regulations, which said rates, rules and regulations shall be the same under which this defendant is now selling and delivering electric power and current to others similarly situated, or as fixed by the Corporation Commission of the State of North Carolina, should application be made to said Corporation Commission to fix rates, rules and regulations, applicable to such service, provided of course, said respective cities grant to this defendant the necessary franchises and privileges to sell and distribute electric power and current to said respective cities and their citizens and inhabitants, and the consumers of power therein."

We quote from the evidence which was uncontradicted, page 184 of the record:

"Q. Is the Southern Power Co. ready, able and willing to sell and deliver electricity to the City of Greensboro and to the City of High Point, or either of them, for the use of these cities and their inhabitants, upon the same terms and conditions that it is now offering to sell electricity to other cities and towns in the State of North Carolina, or at rates, and upon terms and conditions to be fixed by the Corporation Commission of the State of North Carolina? A. Yes, sir.

Again we quote from pages 70 and 71 of petitioner's brief:

"The uncontradicted evidence shows that appellee is engaged in the business of distributing to the consuming public—as well as generating,—electricity. It has spent enormous sums of money in the construction of dams and hydro-electric plants, as well as steam plants, for the generation of electricity, and has also built lines and substations and other necessary parts of a well organized distribution system for the purpose of transmitting its electricity directly to the consuming public in the territory of Greensboro and High Point and has sought and still seeks to do so.

There could, we submit, be no justification for depriving appellee of the right to distribute its own electricity to the consumer and to earn the profit there is in such distribution. The electricity which appellee generates is generated for use by the consuming public. To permit the North Carolina Public Service Company to take this electricity from appellee for the purpose of distributing it through its own instrumentalities, rather than to per-

mit appellee to distribute it would work no change in the use to which the electricity is devoted but would merely enforce a transfer of appellee's property to the Public Service Company and give to the latter the right to earn the profit incident to the distribution of the electricity, and incidentally increase the cost to the consumer."

The court apparently failed to recognize the distinction between the obligation to sell electricity to municipalities for distribution to their citizens and inhabitants, and the right not to be compelled to sell electricity to competitive public service corporations for resale and distribution to the public at a profit.

The distinction is clear both in law and in fact:

(1) Under the law of North Carolina, cities and towns are given authority to operate municipal plants for the distribution of electric power and current to their citizens and inhabitants. (Consolidated Statutes of North Carolina, Sec. 2832, et seq.) In the operation of such municipal plants, cities and towns act as governmental agencies for their citizens and inhabitants, and not for a profit, and are not subject to the control of the State Corporation Commission. (Consolidated Statutes, Sec. 1035, sub-sec. 3, Sec. 1066, sub-sec. 3.)

521 The distinction between a municipal plant, thus operated under legislative authority, and to a public service corporation operated for a profit is universally recognized, and it is sufficient to refer only to the recent decision of the Supreme Court of the United States in the case of *Springfield Gas and Electric Company vs. Springfield*, decided November 27, 1921, where the court said:

"The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must."

(2) A city under its charter can only sell electricity within its corporate limits. A public service corporation is not thus restricted in its operations, but may extend its lines to any point where business may be profitably acquired, as is illustrated by the evidence that the North Carolina Public Service Company has extended its lines for miles beyond the corporate limits of Greensboro and High Point for the sale of electricity to cotton mills, fertilizer plants, ice factories, machine shops, and other industrial enterprises.

The court overlooked, and wholly disregarded, the finding of the District Court that petitioner has never dedicated its property to the use of selling electricity to other public service corporations for resale and distribution to the public, and that while petitioner has in some

522 cases, made sales to such corporations, all such sales have been under special contracts particularly limiting petitioner's obligations, which finding was based upon uncontradicted evidence.

This finding of the District Court was made after hearing the evidence presented in open court, and is set forth in the decree (page 465 of the record). The finding is based upon the uncontradicted evidence which was as follows: Page 142 of the record, W. S. Lee testified on direct examination:

"Q. What are the conditions under which the Southern Power Company sells electricity to other public utility companies?

"A. We have made contracts with a few public utility companies in which we agree to furnish them power for their requirements under terms of contracts defining the different amounts.

"Q. Does the Southern Power Company sell power to other public utility companies except under special contracts?

"A. No, sir, unless you would term the contract with the North Carolina Public Service Company. That is the only case we have."

(The witness was, of course, referring to the fact that petitioner had been furnishing electricity to the North Carolina Public Service Company pending this litigation under the order of the court.)

On cross-examination, the same witness testified (page 167 of the record):

"Q. Please state how many public service companies in North Carolina the Southern Power Company has built its transmission lines up and connected with and is now engaged in furnishing current to in North Carolina, and please name them?

"A. We have the Southern Public Utilities, the Piedmont Company at Burlington and we have a few others.

"Q. You have one at Leaksville?

523 "A. Yes, a small amount of power is sold to a private concern that delivers it near Spray, perhaps at Norwood, a small town that does the same thing, and one at Hillsboro.

"Q. How many do you furnish, and name them of local public utilities in South Carolina?

"A. We have the Southern Public Utilities in South Carolina and the Lancaster Light & Power Company.

"Q. Those are the only two?

"A. I am not sure of that. I was trying to think. That is a very small part of our business but we serve them. They all, however, have contracts and are working under contracts with this company.

"Q. And some of them have a number of years?

"A. Yes, the Public Utilities has several years, and several others."

The plaintiff alleged in its complaint that petitioner had dedicated its property to the public use of selling electricity to other public service corporations for resale. This allegation was denied in the answer (page 54 of the record). Petitioner alleged that, on the con-

trary, its property and business was dedicated only to the use of selling electricity to the consuming public, and that while it had in a few instances sold electricity to other corporations for resale, each of such sales had been made by a special contract, and for a limited period of time.

The burden of proof to sustain the allegations of the complaint was upon the plaintiff. The plaintiff introduced no evidence in support of its allegations. If the evidence upon this subject is not as full and complete as the court might have desired, we submit that petitioner was not called upon to elaborate when no evidence at all had been introduced by the plaintiff. The responsibility for any lack of evidence is clearly with the plaintiff, and having failed to introduce any evidence whatsoever in support of the allegations of its complaint, it cannot supply the lack of evidence by calling in aid the groundless allegations of the complaint.

Notwithstanding the settled rule that "the findings of the trial court in an equity case are presumptively correct," this court
524 entirely disregarded the above stated finding of the District Court. The finding is not even mentioned in the opinion of the Court.

In stating that the sale of electricity to other public service corporations is "one of the chief corporate activities of the power company" (page 13 of the opinion), and that petitioner is "exercising its corporate powers mainly, if not entirely, for the wholesale manufacture and sale of Hydroelectric current" (page 10 of the opinion), the court overlooked the undisputed evidence to the contrary."

We have cited the evidence which is not contradicted, that petitioner has sold only a very small part of its electricity to other companies for resale; that such sales have been made only for limited periods of time, and under the terms of special contracts. The evidence further shows that during the twelve months, ending April 30, 1921, petitioner sold in North Carolina, 374,669,534 kilowatt hours of electricity (page 141 of the record). With the exception of the small part sold to other corporations under the special contracts described, this electricity was distributed by petitioner directly to the public, including cities and towns, domestic consumers, and manufacturing and industrial enterprises.

There is no evidence in support of the proposition stated in the opinion of the court that petitioner has exercised the right of condemnation in making sales of electricity to "independent vendors," and under well established principles of law it cannot be held that, because petitioner has sold electricity to "independent vendors" for
525 limited periods of time, under the terms of special contracts, it has become obligatory upon it, under the provisions of its charter, to sell electricity to "independent vendors" in the absence of contract, merely because the power of eminent domain is conferred upon petitioner by statute, in consideration of its service to the "public."

The opinion states:

"The Southern Power Company, by its charter, is authorized, among other things, 'to buy, sell, operate or lease pole lines, erect

poles, string wires thereon, or on poles of other individuals or corporations * * * and to use the same, either for the transmission of electric current for delivery to consumers on such lines, or for transmission of current to independent vendors thereof, and to sell or lease to other individuals or corporations the right to string wires on or attach electric wires to any or all poles so erected, owned or leased, and to use such lines, both as through lines and for local delivery.' "

(Page 5 of the opinion.)

"In this instance the Southern Power Company has definitely, undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter, and for that purpose has exercised the power of eminent domain conferred by the State."

(Page 11 of the opinion.)

"This power of eminent domain cannot be separated from the duties assumed by the corporation."

(Page 8 of the opinion.)

Petitioner respectfully alleges error in the foregoing for these reasons:

(1) There is no evidence that petitioner has exercised the right of condemnation in making sales of electricity to other public service corporations for resale, and in so far as the reasoning of the Court is based upon the contrary assumption, it is not supported by the record.

(2) This case, in the present particular, differs in no respect from the cases where, railroads had entered into special contracts to carry express cars, pullman cars, or circus trains, in all of which the universal holding by the Supreme Court, and other Federal Courts of high authority, has been that there was no obligation to render a similar service in the absence of contract. The railroads, of course, had the power to make such contracts under their respective charters, just as petitioner has the power under its charter to sell electricity to another public service corporation for a limited period of time, under the terms of a special contract. Likewise, the power of eminent domain was conferred upon the railroads in consideration of their service to the public, just as it is upon petitioner, but this was not held to impose any obligation in favor of other public service corporations in the absence of contract.

(3) Petitioner's charter does not impose upon it the obligation to sell electricity to "independent vendors." It merely gives petitioner "permissive" power to make such sales, just as it confers upon it the power of leasing to other corporations the right to string wires on its poles, or to lease water rights. Because petitioner by contract, may have leased water rights, or the right to string wires on its poles, to other public service corporations it is not bound to grant similar

rights to all corporations. The power to make such leases, as well as the power to sell electricity to "independent vendors" certainly may be kept the subject of contract. The undisputed evidence shows that petitioner has kept it so. The exercise of this right of contract cannot be held to destroy the right itself, with the

527 result that, because petitioner has under its charter soon fit, by special contract, to sell electricity to several public service corporations for resale, for limited periods of time, it has incurred the obligation to make similar sales to all other public service corporations, and thereby irrevocably dedicated its property to their use.

The Court apparently overlooked the fact that the North Carolina Public Service Company has the same powers, under its North Carolina Charter, to acquire and develop hydroelectric power and make it available to the territory in which it does business, as petitioner has under its New Jersey Charter, and in so far as it is held that the failure of the North Carolina Public Service Company to exercise its charter powers has imposed upon petitioner any obligation to turn over to the North Carolina Public Service Company for resale to the public at a profit the Electric Power which petitioner has developed and made available we respectfully submit that the Court erred.

The opinion states:

"The Southern Power Company and these connected companies own and control all the hydroelectric power now developed and available to the region of the country in which the cities of Greensboro and High Point are situated. It is true that the water power of the State of North Carolina is estimated to be capable of producing electric power of 1,095,000 horse power. Consideration is to be given to future possibilities, including the possibility of the plaintiffs acquiring and developing water power for their own use. But
528 an important factor in that consideration is the deterring fear which others must have of being unable to compete in a field so largely pre-empted by the Southern Power Company, a corporation rich in resources and experience. If others hereafter enter the field with the great resources adequate to compete in the production and sale of hydroelectric power, it may be that the courts would then deal with such questions as are now before us with the element of exclusive control eliminated. We are now dealing with the present condition, and that condition is that the Southern Power Company and the companies with which it connects have control of the generation and sale of hydroelectric power which is available to the North Carolina Public Service Company and the cities of Greensboro and High Point, and other independent vendors and cities and towns in like situation, except in so far as it is subject to regulation by the North Carolina Public Service Commission."

(Page 7 of the opinion.)

We respectfully submit:

(1) There is no evidence that petitioner has sought to monopolize the water powers of North Carolina, or been guilty of any unlawful act or conduct whatsoever, in the prosecution of its business. It has

developed the water powers of only one river: the Catawba River. The Yadkin River and the Roanoke River are both closer to the territory embracing Greensboro and High Point than is the Catawba River (pages 147 and 148 of the record), and there is just as much hydroelectric power on each of these rivers as there is on the Catawba River (page 148 of the record). The North Carolina Public Service Company has the same powers to acquire and develop hydroelectric power under its North Carolina charter as petitioner has under its New Jersey charter.

(2) The opinion apparently concedes that if the North Carolina Public Service Company had performed the duties imposed upon it by its North Carolina charter, and had acquired and developed hydroelectric power, and made it available for its use for sale and distribution to the public in the territory in which it does business, it would have no right to take petitioner's property for resale to the public in the prosecution of its business as an independent public service corporation. It is further apparently conceded that if others hereafter developed hydroelectric power and make it available to the territory in question, petitioner may be relieved of any further obligation to turn over its property to others for resale to the public.

We respectfully submit that petitioner's property rights cannot be made dependent upon the action or non-action of others over whom it has no control.

The court erred in its construction of the North Carolina statute (Consolidated Statutes, Sec. 1054) because it overlooked the fact that the supreme court of North Carolina has construed this statute or require public service corporations to furnish equal facilities or privileges, only to members of the consuming public.

The opinion (page 6) quotes the above cited statute as follows: "The Corporation Commission shall make reasonable and just rules and regulations to prevent discrimination in the transportation of freight and passengers, or in furnishing electricity, electric light, current, power or gas."

The statute as originally enacted, applied only to railroads, and as thus applied was construed by the Supreme Court of North Carolina in the case of Express Company v. Railroad, 111 N. C., page 463, cited and discussed on pages 55 and 56 of petitioner's brief. The court held that the statute required the railroads to afford equal facilities and privileges only to members of the "public," and expressly refused to construe the statute as requiring a railroad to furnish express facilities to one to conduct an express business over its road, because it afforded such facilities to another under the terms of a special contract. This decision has never been overruled, modified or even criticized by the Supreme Court of North Carolina. The statute has since been amended so as to apply to companies furnishing electricity, power, and gas. Necessarily the same construction must be given it as applied to such companies, as was given it as applied to railroads, and we submit that the Court erred in overlooking the settled construction given the statute by the highest court of the State.

The court in its opinion, entirely overlooked or disregarded the contracts between petitioner and the North Carolina Public Service Company which, as a matter of law, estop the latter from now claiming that petitioner had dedicated its property to the use of furnishing electricity to the North Carolina Public Service Company to be resold and distributed by it to the public.

In the Express Company Cases, 117 U. S., page 1, the Supreme Court said:

"The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these roads, because their entry was originally under special contracts; and no other companies have ever been admitted except by agreement. * * * They were willing to begin to expand their business upon this understanding and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments upon them. If the general public were complaining because the railroads refused to carry express matter themselves on their passenger trains, or to allow it to be carried by other different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights."

The contract between petitioner and the North Carolina Public Service Company (or its predecessor, Greensboro Electric Company) for the sale of electricity at Greensboro provided for its sale—

"at the time and the place or places and for the purposes, and in the amounts, and in the manner and in accordance with the terms, limitations and conditions hereinafter set forth, for and during, and this contract shall continue in force for the term of ten (10) years from the date or day on which the delivering of such electric power or electricity hereunder is and shall be actually begun" (page 235 of the record), and provided that at the expiration of the contract it should be lawful for petitioner to enter any "place or places whatsoever as or in which any meter, apparatus, appliances, fixtures, or other property of said Power Company, is, are or may be and remove, take and carry away the same." (Page 241 of the record.)

The contract between petitioner and the North Carolina Public Service Company or its predecessor, High Point Electric Power Company, for the sale of electricity at High Point, is in similar terms.

The Court overlooked the fact that at the time that these contracts were entered into the principles of law declared by the Supreme Court of the United States in the Express Company Cases, had been adopted by the Supreme Court of North Carolina as the law of that jurisdiction in the case of Express Company v. Railroad, 111 N. C., page 463, cited and relied upon on page 56 of petitioner's brief. The parties are presumed to have entered into these contracts in contemplation of the law as thus declared, and the law is as much a part of the contracts as if expressly written into them.

The Court apparently overlooked the uncontradicted evidence that

both parties recognized the relation as a contractual one, and that the obligation of petitioner to sell, as well as that of the North Carolina Public Service Company to purchase, were purposely limited by the terms of the contracts, as shown by the negotiations preceding the making of the contracts set forth in the record. (Pages 138 and 139 and 224 to 234.)

On pages 144 and 145 of the record it appears that three or four years before the expiration of the contracts, negotiations were opened between representatives of petitioner and representatives of the North Carolina Public Service Company, concerning the renewal of the contracts at their expiration. As the result of these negotiations petitioner was informed that at the expiration of the contracts they would not be renewed, and that it was the purpose of the North Carolina Public Service Company to build an hydroelectric plant at High Rock, on the Yadkin River, between Salisbury and Greensboro, and transmit power thence to the cities of Salisbury, Greensboro, and High Point.

The evidence is conclusive that the North Carolina Public Service Company at all times understood that there was no obligation on the part of petitioner to sell it electricity for resale in the absence of contract, and that the contracts alone fixed and limited the rights and obligations of each party. This is clearly set forth in the report furnished W. S. Lee, Vice-President of petitioner, by E. C. Deal, 533 Vice-President and General Manager of the North Carolina Public Service Company, which was introduced in evidence and which is set forth in part on page 147 of the record, as follows:

"The contracts of the N. C. Public Service Co. are three in number and all expire about 1919. These contracts limit the maximum demand to 3,000 kw. for Greensboro, 420 for Salisbury, and 1,200 kw. for High Point. The contracts carry a rate of 1.1c. per kwh. on all current purchased except a portion at 1.35c. per kw. at High Point. Under the conditions of these contracts the N. C. Public Service Co. is limited to obtaining of lighting and small power business. Except by special permission they are now allowed to serve large power consumers. On account of the probable electric railway extensions, and the fact that the N. C. Public Service Co. is reaching a point where its ability to take on new business will necessitate a new contract with the Southern Power Co. with a probable rate increase or an enlargement of the N. C. Public Service Co.'s own steam plant makes the High Rock development an interesting proposition, especially so if proper arrangements can be made with the Southern Power Co. to take the output above requirements of the N. C. Public Service Co. until the Public Service Co. shall need the output."

This Court, in referring to the Express Company Cases, said, on page 11 of the opinion:

"The Supreme Court cases relied on by the defendant are not controlling. In The Express Company Cases, 117 U. S. 1, the basis of the decision is that the railway companies never held them-

selves out as public service corporations in the sense of furnishing accommodation to other carriers who might wish to do an independent business on their lines."

534 But the Court was inadvertent to the fact that the Supreme Court held that the railway companies had never dedicated their property to this class of service, because they had protected themselves by contracts which entitled them to discontinue the service in accordance with the terms of such contracts, just as petitioner has done. The Express Company Cases have been repeatedly approved by the Supreme Court, notably in the case of *Baltimore and Ohio Southwestern Railway Company vs. Voigt*, 176 U. S. 498, 44 L. ed. 560.

The Court also overlooked the fact that the District Court found upon the evidence in this case that petitioner has never dedicated its property to the use of selling electricity to other public service corporations for resale.

The Court overlooked the fact that petitioner and the North Carolina Public Service Company are competitors in the sale of electricity to the public and that the result of its decision will enable the North Carolina Public Service Company to extend its competition with petitioner throughout the territory in which petitioner does business, and the Court, therefore, erred in failing to give application to the acknowledged "Proposition of law that one competitor in business cannot demand service of another in promotion of its business."

The evidence is undisputed that the North Carolina Public Service Company is, at present, engaged in the distribution of electricity in the cities of Salisbury, Greensboro and High Point, selling at wholesale to the latter for redistribution to its citizens and inhabitants, and in the sale of electricity to cotton mills, fertilizer plants, ice factories, machine shops, and other manufacturing and industrial enterprises in the territory surrounding these cities.

535 its lines in some instances extending five miles, or more, beyond the corporate limits. The evidence is undisputed that petitioner is engaged in the sale of electricity in this same territory in competition with the North Carolina Public Service Company, and has offered and stands ready to serve the needs of all consumers to the extent of its ability.

If the decision of the Court stands, the North Carolina Public Service Company can "so strengthen its stakes and lengthen its cords" as to place itself in competition with petitioner throughout the territory in which petitioner does business, and thereby constitute itself the distributing company for petitioner's electric power.

Every similar company now in existence, or hereafter to be organized, may claim the same right, and petitioner may be met on every hand by others who have been enabled to compete with it at its expense.

We submit that the general proposition of law, stated on page 10 of the opinion, "that one competitor in business cannot demand service of another in promotion of its business," fully applies to the facts of this case.

Through a misconception of the controversy actually presented by the record, the Court has come to a decision in conflict with controlling authorities holding, (a) that a Public Service Corporation is entitled to serve the public through its own instrumentalities, or those of its own selection, and cannot be compelled against its will to select another such corporation as an agency for its service; (b) nor be compelled against its will to give over its property, or the use of its facilities, to another such corporation to be used by it in the discharge of its corporate powers; (c) nor can it be compelled to aid a competitor in the promotion of its business.

The authorities referred to are cited and relied upon in petitioner's brief, pages 37 to 50 and pages 72 to 74.

The principles to be deduced from them have been variously stated to the effect that one who engages in public service "may select his own agencies and his own associates for doing his work," and "owes no duty to the public as to the particular agencies he shall select for that purpose;" that one who has devoted his property to a public use, himself, has the right to employ it in this use and cannot be compelled to give it over to another to be employed in the same use, upon the ground that "where there is no change in the use there cannot be a change in ownership;" and that while a public service corporation must devote its property to the use of the public it is not bound to aid a competitor in promotion of his business.

Apparently the Court did not follow these well established principles of law because it was under the impression (which we have endeavored to show was mistaken) that the sale of electricity to "independent vendors" is "one of the chief corporate activities" of petitioner (page 3 of the opinion), with the result that petitioner is, "exercising its corporate powers mainly, if not entirely, for the wholesale manufacture and sale of hydroelectric current" (page 10 of the opinion); that petitioner "has definitely undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter, and for that purpose has exercised the power of eminent domain conferred by the State" (page 11 of the opinion); and that the contentions of petitioner are that it "can continue to exercise these powers bestowed by the public, without responsibility to the public, arbitrarily discriminating in rates" (page 13 of the opinion;) and "that it may refuse to furnish current on any terms to cities and towns themselves, to be resold to their inhabitants; that it has absolute freedom of contract to discriminate in price and terms between all independent vendors, including cities and towns."

The emphasis laid upon the foregoing propositions by the Court shows the importance which the Court placed upon them, and we venture to respectfully submit the extent to which the Court was misled by overlooking the want of any foundation in the record for the propositions stated, for if it were established that petitioner could decline to serve the public, including cities and towns, or could discriminate in rates, then it can be readily seen that the door would be

opened to unjust discrimination against the public, and they might be subjected to unreasonable rates and terms for the service they are entitled to demand.

But when, on the contrary, it is established by the admissions of record and the uncontradicted evidence that petitioner does not deny its duty to serve the public, including cities and towns, nor claim the right to discriminate, but admits, as indeed it must, under the law of North Carolina, that it must continue to render its service to the public under the full regulatory powers of the State, we submit that it necessarily follows, under the authorities cited in petitioner's original brief, that it is entitled to claim the right to serve the public through its own instrumentalities or those of its own selection, it can not be compelled to turn over its property to another competitive public service corporation for resale to the public at a profit.

The effect of the decision of the court in this cause is to deprive petitioner of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

538 We submit:

(1) Under the pleadings, and upon the evidence the District Court found that petitioner has never dedicated its property to the use of selling electricity to other independent public service corporations for resale and distribution to the public. This finding supported, we submit, by the undisputed evidence, is entirely overlooked by the Court. Hence, to compel petitioner, in the absence of such dedication, to devote its property to the use of other public service corporations deprives it of its property in violation of its constitution rights. *Northern P. R. Company vs. North Dakota*, 236 U. S. 585; *L. & N. R. R. Company vs. Central Stock Yards Company*, 212 U. S. 132; *Atchison, T. & S. F. R. R. Co. vs. Denver, etc. Co.*, 110 U. S. 667; *Memphis & Little Rock R. R. Co. vs. Southern Express Company*, 117 U. S. 1; *Lewis on Eminent Domain* (3rd ed.), sec. 440.

(2) We respectfully submit that the decision subjects petitioner to the whim and caprice of every other public service corporation now in existence in the territory in which petitioner does business, or hereafter to be organized, and gives them the right to ingraft themselves on petitioner and sap its electric power wherever and so long as they may find it profitable to do so.

The decision of the court in this case is of vital importance to every public service corporation in this circuit engaged in producing and distributing electric current, or other commodity, for the reason that it perpetuates the power of every "independent vendor" of such current or commodity to take, without let or hindrance, the property of the producing companies for distribution by such
539 & 540 "independent vendors," thereby depriving producing companies of the right to distribute to the consuming public the commodity produced by them.

Wherefore, for the reasons and upon the grounds hereinbefore stated, your petitioner respectfully prays that a rehearing of this

cause be allowed, and that the mandate of this Court be stayed pending the disposition of this petition. Respectfully submitted, Southern Power Company, a Corporation, by Wm. P. Bynum, W. S. O'B. Robinson, Jr., E. T. Cansler, Its Attorneys.

We, the undersigned counsel, duly admitted to practice in the United States Circuit Court of Appeals, for the Fourth Circuit, and of counsel for the Southern Power Company, a corporation, appellee, do hereby certify that in our opinion, and in the opinion of each of us, the foregoing petition for a rehearing in Case No. 1927 (North Carolina Public Service Company, City of Greensboro and City of High Point, appellants, vs. Southern Power Company, appellee), is well founded and that a rehearing in said case should be granted, and that said petition is not made for the purpose of delay.

Given under our respective hands this 14th day of June, A. D., 1922. Wm. P. Bynum, W. S. O'B. Robinson, Jr., E. T. Cansler.

541

Order Denying Rehearing.

[Filed and Entered July 10, 1922.]

[Title omitted.]

This court having at its May Term, 1922, rendered its decision modifying the decree of the said District Court appealed from in this cause, and the appellee having on June 15, 1922, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered.

It is now here ordered by the Court that the rehearing asked for be, and the same is hereby, denied at the cost of the appellee.

It is further ordered that the mandate of this Court in this cause issue after the expiration of 15 days from this date. C. A. Woods, U. S. Circuit Judge. July 10, 1922.

542 Order Staying Mandate Pending Application in Supreme Court for a Writ of Certiorari.

[Filed July 15, 1922.]

[Title omitted.]

Upon the application of the Appellee, by its counsel, W. P. Bynum, Esq., and for good cause shown,

It is ordered, that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending Appellee's application in the Supreme Court of the United States for a writ of certiorari to this Court, provided said application for certiorari is filed in the said Supreme Court within 45 days from this date. C. A. Woods, U. S. Circuit Judge. July 15, 1922.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk for the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 5th day of August, A. D. 1922. Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit.. [Seal of the United States Circuit Court of Appeals, Fourth Circuit.]

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

I, Claude M. Dean Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 2nd day of December, 1922, by annexing hereto a certified copy of the stipulation of Counsel of record, that the transcript of the record on file in the Supreme Court of the United States on application for writ of certiorari herein shall be taken as a return to the writ of certiorari issued by the Supreme Court in this suit.

In testimony whereof, I hereto set my hand and affi. the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 13th day of December, A. D., 1922. Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. [Seal of United States Circuit Court of Appeals, Fourth Circuit.]

Stipulation.

(Filed Dec. 12, 1922.)

In the above entitled suit, it is hereby stipulated and agreed by and between the counsel for the respective parties that the transcript of the record on file in the Supreme Court of the United States on application for writ of certiorari herein shall be taken as a return to the writ of certiorari issued by the Supreme Court in this suit.

This the 9th day of December, 1922. R. V. Lindabury, W. S. O'B. Robinson, Jr., Wm. P. Bynum, R. C. Strudwick, Attorneys and Counsel for the Southern Power Company, Petitioner. A. L.

Brooks, Attorney and Counsel for the North Carolina Public Service Company. B. L. Fentress, Attorney and Counsel for the City of Greensboro. Dred Peacock, Attorney and Counsel for the City of High Point, Respondents.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude, M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of Counsel is a true copy of the original filed December 12, 1922, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 13th day of December, A. D., 1922. Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. [Seal of United States Circuit Court of Appeals, Fourth Circuit.]

547

Writ of Certiorari.

(Filed December 14, 1922.)

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which North Carolina Public Service Company et al. are appellants, and Southern Power Company is appellee, No. 1927, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of North Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do command you that

548 you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

549 [Endorsement omitted.]

550 [Endorsement omitted.]

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1921.

No. .

SOUTHERN POWER COMPANY, PETITIONER,

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO, AND CITY OF HIGH
POINT, RESPONDENTS.

**MOTION FOR WRIT OF CERTIORARI TO THE CIR-
CUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT.**

Comes now the Southern Power Company, petitioner, by
its attorneys, and moves this honorable court that it will by
certiorari or other proper process, directed to the honorable,
the judges of the Circuit Court of Appeals of the United
States for the Fourth Circuit, require said court to certify to
this court for its review and determination a certain suit in

the said Circuit Court of Appeals lately pending, wherein petitioner, Southern Power Company, was appellee and the said North Carolina Public Service Company, City of Greensboro, and City of High Point were appellants, and to that end the petitioner now tenders herewith its petition and brief and a certified copy of the entire record in the said cause, including the proceedings in the said Circuit Court of Appeals

R. V. LINDABURY,
W. S. O'B. ROBINSON, JR.,
E. T. CAUSLER,
WM. P. BYNUM,
R. C. STRUDWICK,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. —.

SOUTHERN POWER COMPANY, *Petitioner,**vs.*NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF
GREENSBORO, and CITY OF HIGH POINT, *Respondents.*

NOTICE.

To the North Carolina Public Service Company and to Messrs. King, Sapp and King and A. L. Brooks, its attorneys; to the City of Greensboro and to Charles A. Hines, Esquire, its attorney, and to the City of High Point and to Dred Peacock, Esquire, its attorney:

This is to notify you that the petitioner will on the 2d day of October, 1922, present to the Supreme Court of the United States, in its court-room, in Washington, D. C., its motion for a writ of certiorari upon its verified petition and a duly certified copy of the entire record in this suit, and a copy of said motion and of the said petition and of the brief accompanying the same are herewith delivered to you.

This the — day of —, 1922.

SOUTHERN POWER COMPANY,

By R. V. LINDABURY,

W. S. O'B. ROBINSON, JR.,

E. T. CAUSLER,

WM. P. BYNUM,

R. C. STRUDWICK,

Its Attorneys.

The foregoing notice and delivery of a copy thereof and of the motion and petition for writ of certiorari and of the brief are hereby acknowledged this the — day of —, 1922.

Attorneys for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

SOUTHERN POWER COMPANY, *Petitioner*,

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF
GREENSBORO, and CITY OF HIGH POINT, *Respondents*.

**PETITION FOR WRIT OF CERTIORARI TO THE CIR-
CUIT COURT OF APPEALS OF THE UNITED
STATES FOR THE FOURTH CIRCUIT.**

*To the honorable the Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

The petitioner, Southern Power Company, files this its petition for a writ of certiorari to review a decision of the Circuit Court of Appeals of the United States for the Fourth Circuit made and entered in this suit on May 10, 1922 (petitioner's application for rehearing denied July 10, 1922), and in support of its petition it respectfully shows unto this court as follows:

Summary of the Matter Involved.

This suit was instituted by the respondents against the petitioner in the Superior Court of Guilford County, North Carolina, on September 2, 1920. It was denominated by the respondents an application for a writ of mandamus to compel petitioner to continue furnishing to the North Carolina Public Service Company for its own use and for distribution and

resale by it to its customers, including the cities of Greensboro and High Point and certain manufacturing establishments, electric current generated by the petitioner, as petitioner had been doing theretofore under certain special contracts which had expired by limitation of time.

Petitioner in apt time filed in the said Superior Court its petition and bond for the removal of the said suit to the District Court of the United States for the Western District of North Carolina on the ground of diverse citizenship, petitioner being a corporation created by the State of New Jersey and respondents being corporations created by the laws of the State of North Carolina. It alleged that the respondents by the use of the word mandamus sought to characterize the suit as a proceeding for a writ of mandamus, of which it was conceded the District Court would have no jurisdiction, yet it was in fact, as was shown by the facts alleged in the complaint, the object sought to be obtained, and the relief actually prayed for, a suit in equity for an injunction, of which the District Court did have jurisdiction, and that the said suit was therefore properly removable into that court. The said Superior Court on September 11, 1920, refused the petition to remove, and, upon appeal, the Supreme Court of the State, two justices dissenting, affirmed this ruling.

Petitioner, on September 15, 1920, caused a transcript of the record from the said Superior Court to be docketed in the said District Court and thereafter filed its answer there. The respondents, on December 20, 1920, moved in the said court to remand the said suit to the State court. This motion was denied, and thereafter the said District Court made an order enjoining respondents from proceeding further with the said suit in the courts of the State.

The suit was heard in the District Court at Greensboro, North Carolina, June 16, 1921. At the trial respondents (plaintiffs) introduced no evidence, but made a motion for judgment in their favor upon the pleadings, which was denied. Petitioner (defendant) thereupon introduced evidence in support of the affirmative defenses and counterclaims alleged in its answer. Upon this evidence and upon consideration of the whole case the District Court made certain findings of fact, in part as follows:

(1) That the defendant (Southern Power Company) has never dedicated its property to the public use of selling electricity to other public utility companies for resale and distribution by the said companies; that while the defendant has in some cases sold electricity to other public utility companies to be resold and distributed by them and has in other cases sold electricity to municipalities for the use of such municipalities, their citizens and inhabitants, all such sales have been made under special contracts in each case particularly limiting and defining the amount and character of electricity sold by the defendant, the time during which the same should be sold and delivered, and the terms and conditions of the sale and delivery thereof.

(2) That the North Carolina Public Service Company by its charter has the right to secure, develop, and operate hydroelectric plants and to generate electricity and sell and distribute it; that the powers granted the North Carolina Public Service Company in this respect are the same as those possessed by the Southern Power Company.

(3) That the North Carolina Public Service Company sells and distributes electricity that has been purchased from the defendant in competition with the defendant.

(4) That the defendant (Southern Power Company) did heretofore contract and agree with the High Point Electric Power Company to sell it electricity for its use and for resale and distribution at High Point, North Carolina, and with the Greensboro Electric Company for the sale of electricity for its use and for resale and distribution at Greensboro, N. C.; that the complainant, North Carolina Public Service Company, thereafter acquired the property and franchise of each of said companies and succeeded to the rights of each under its contract with the defendant for the purchase of electricity as aforesaid; that the contract originally made with the High Point Electric Power Company expired in December, 1919, and the contract originally made with the Greensboro Electric Company expired in January, 1920; that prior to the expiration of said contracts the defendant offered to enter into further contracts with the complainant, North Carolina Public Service Company, for the sale of electricity at High Point and Greensboro at the rates then established and in force by the defendant and at which it was then contracting with other customers for similar service, but which said rates were one mill a kilowatt hour in advance of the price which the defendant was charging the Southern Public Utilities Company for the sale of electricity at Charlotte, North Carolina, under a contract which had been entered into between the defendant and the Southern Public Utilities Company prior to the adoption by the defendant of the rates in force at and shortly prior to the expiration of the aforesaid contracts to which the complainant, North Carolina Public Service Company, had succeeded; that the North Carolina Public Service Company contended that it was entitled to contract with the defendant for the purchase of

electricity at Greensboro and High Point at the same rate per kilowatt hour which the defendant was charging the Southern Public Utilities Company for electricity at Charlotte, N. C., under the contract aforesaid, notwithstanding the fact that said contract was made and entered into prior to the adoption by the defendant of the rates in effect at the time of the expiration of said complainant's contracts, and that the defendant was charging said Southern Public Utilities Company and other customers a higher rate at places other than Charlotte, and the North Carolina Public Service Company declined to enter into further contracts with the defendant at the defendant's rates then in effect; that after the expiration of the said original contracts the defendant continued during the year 1920 to sell and deliver electricity to the complainant, North Carolina Public Service Company, for its use and for resale and distribution at Greensboro and High Point under and pursuant to the terms of the letters attached to and made a part of the bill of complaint and identified as Exhibits "A" and "B" (Record, pages 465, 466, and 467).

The said court thereupon entered its decree, which, in part, was as follows:

I.

That the complainants have no legal right to require and compel the defendant to sell and deliver electricity to the complainant, North Carolina Public Service Company, for resale and distribution by said North Carolina Public Service Company to said cities of Greensboro and High Point and their citizens and inhabitants and to the other customers

of said North Carolina Public Service Company, and that the complainants are not entitled to have the defendant enjoined from discontinuing the sale and delivery of electricity to said North Carolina Public Service Company for such uses and purposes.

II.

That the North Carolina Public Service Company is entitled to require the defendant to sell and deliver to said North Carolina Public Service Company at the terminal or delivery point at which the defendant has heretofore sold and delivered it electricity for use by the complainant as a motive power in operating and propelling the street-railway systems operated by said complainant in the cities of Greensboro and High Point and the vicinities thereof upon the terms and conditions hereinbefore recited and set out in this decree.

From this decree respondents appealed to the Circuit Court of Appeals for the Fourth Circuit. On May 10, 1922, that court (Waddill, judge, dissenting) rendered its decision. The Southern Power Company filed a petition for rehearing, which was entertained and considered and was denied on July 10, 1922. In the said decision that court held that the suit, though denominated one for mandamus, was in reality a suit in equity for an injunction; that it was therefore a suit of which the District Court of the United States had jurisdiction to hear and determine and that it was properly removed into that court; that the District Court properly refused to remand said suit, and that it committed no error in enjoining further proceedings by the respondents

in the State court after the transcript of the record had been docketed in the District Court of the United States. The Circuit Court of Appeals further held and decided, however, that the said District Court did err in holding that the respondents had no right to require petitioner to furnish to the North Carolina Public Service Company current for resale by it to the cities of Greensboro and High Point, their citizens and inhabitants, and to its other customers, including manufacturing establishments, and modified said decree and order and directed petitioner to continue to furnish the North Carolina Public Service Company electric current generated by petitioner for resale and distribution by the North Carolina Public Service Company to its said customers and consumers substantially as it had done theretofore.

In this portion of the decision of the Circuit Court of Appeals petitioner alleges there is error and asks this court to review it and to correct said error by certiorari. Petitioner did not appeal from and does not now complain of that portion of the decree of the District Court which required it to furnish to the North Carolina Public Service Company electric current for its own use in operating its street railway system.

Petitioner does not deny that it owes a duty to the public, including the citizens of Greensboro and High Point, to furnish them electric current for domestic, manufacturing, and municipal purposes, and it has always avowed its readiness and ability to do this if a franchise permitting this were granted to it by the said cities.

It does not contend that in furnishing said current for such consumption it is not subject to regulation by the proper authority, as are other public service companies. It

does not contend that in furnishing current as aforesaid it can discriminate as to said consuming public.

The said Circuit Court of Appeals by its decision aforesaid in effect held and decided that the petitioner, a public-service corporation, in the absence of a contract owes to the respondent North Carolina Public Service Company, a similar public service corporation, the duty of furnishing it electric current manufactured and generated by the petitioner, for resale and distribution to the public by the North Carolina Public Service Company at a profit to it, and in competition with the petitioner, in derogation of petitioner's right to distribute its own product to the public through its own instrumentalities or instrumentalities of its own selection, such distribution by the petitioner being subject to regulation by the proper authority and without discrimination.

Reasons Relled upon for the Allowance of the Writ of Certiorari.

The question presented in this petition is of grave and vital importance, both to the parties and the public at large. The effect of the said decision, if allowed to stand, is highly injurious to the business of petitioner for the reason that it enables every independent vendor or competitor of petitioner to engraft itself upon petitioner as a parasite or incubus, sapping its electric power for resale by it at a profit whenever it may be found profitable so to do. The consuming public will also suffer from this decision because the necessary effect of it is to add to the cost of the commodity (the electric current) not only the profit which the producing company is entitled to receive but the super-added profit of such in-

dependent vendor or competitor from whom the consumer buys directly.

It is also respectfully submitted as a reason for allowing this writ that the effect of this decision is to infringe the constitutional rights of petitioner as set up in the answer, by depriving it of its property without due process of law and also depriving it of its freedom of contract; rights guaranteed to it by the Constitution of the United States. The trial court found, and upon uncontradicted evidence, that the petitioner has never dedicated its property to the supplying of electric current to independent vendors. Petitioner respectfully submits that this finding of the District Court is the only one properly deducible from the evidence, and that the finding of the Circuit Court of Appeals to the contrary finds no support in the record and is erroneous. To support its contention in this respect the petitioner here calls attention to the evidence upon this material point as disclosed by the record. This evidence shows how the current generated by the petitioner has been disposed of; that no more thereof has been disposed of to public-service utilities for resale than here appears, and it shows further that no such sale has been made, except under special contracts; that such sales constitute but a small part of the business, and that in no sense has petitioner ever become a wholesale manufacturer of electric current engaged in selling its product to public utility companies as a business. The record shows (uncontradicted testimony of W. S. Lee, vice-president of the petitioner) that for twelve months ending April 20, 1921, the petitioner sold 595,916,911 kilowatt hours (Record, page 141). It also shows that of this amount 6,600,400 kilowatt hours were distributed through the North Carolina Public

Service Company to High Point and 8,270,600 kilowatt hours to Greensboro (Record, pages 143 and 144). That in addition to the North Carolina Public Service Company the petitioner sold current for resale to the Leaksville, Hillsboro, and Norwood Power and Light Companies in North Carolina and to the Lancaster Light and Power Company in South Carolina. The contracts with the North Carolina Companies appearing in the record indicate that the amount supplied to them is small. This witness also says that the petitioner is supplying current to approximately three hundred cotton mills (Record, page 173). Also to some other industries. It also supplies current to a number of municipalities for public and domestic use (Record, page 175).

In 1914 the Southern Public Utilities Company was formed. Prior to that time the Southern Power Company had contracts under which it was supplying domestic consumers in a number of towns. These contracts were thereupon turned over to the Southern Public Utilities Company, which has since been supplying them with current obtained from the petitioner. The Southern Public Utilities Company is owned and controlled by the same stockholders who own and control the Southern Power Company. The two companies are affiliated and have offices together at Charlotte, N. C. (Record, page 179).

The Circuit Court of Appeals refers to the Southern Public Utilities Company as an "offshoot" of the petitioner and controlled by it.

From the foregoing it appears that the petitioner sells from ninety to ninety-five per cent of its current (including that sold through the Southern Public Utilities Company) direct to consumers, and that it does not wholesale its current

in the sense of selling it to retailers for resale except to four or five companies who obtain it in relatively small amounts under contracts which limit their supply both as to quantity and time.

As bearing directly upon this phase of the case, attention is here called to the following testimony of Mr. Lee:

Q. What are the conditions under which the Southern Power Company sells electricity to other public utility companies?

A. We have made contracts with a few public utility companies in which we agreed to furnish them power for their requirements under terms of contract defining the different amounts.

Q. Does the Southern Power Company sell power to the other public utilities companies except under special contract?

A. No sir, unless you would term the contract with the North Carolina Public Service Company; that is the only one we have.

Record, page 145.

Q. Please state how many public service companies in North Carolina the Southern Power Company has built its transmission lines up to and connected with and is now engaged in furnishing current to in North Carolina, and please name them?

A. We have the Southern Public Utilities, the Piedmont Company of Burlington, and we have a few others.

Q. You have one at Leaksville?

A. Yes sir, a small amount of power is sold to a private concern that delivers it near Spray, perhaps at Norwood, a small town that does the same thing, and one at Hillsboro.

Q. How many do you furnish, and name them, of local public utilities in South Carolina?

A. We have the Southern Public Utilities in South Carolina, and the Lancaster Light & Power Company.

Q. These are the only two?

A. I am not sure of that. I was trying to think. That is a very small part of our business, but we serve them. They all, however, have contracts and are working under contracts with this company.

Record, pages 167 and 168.

The trial court further found upon uncontradicted evidence that the North Carolina Public Service Company is a competitor of petitioner, being engaged in the sale of electric current in the same territory in competition with it. It also appears from the evidence without contradiction that petitioner is and has been at all times ready, willing, and able to serve through its own instrumentalities the needs of all consumers subject to regulation by the proper authority and without discrimination.

If this decision stands, the North Carolina Public Service Company can place itself in competition with petitioner throughout the entire territory in which petitioner operates and thereby constitute itself a distributor of the electric current manufactured and generated by the petitioner at its plants. Every similar independent vendor now existing or hereafter organized can do the same, and petitioner will be met on every side by those who are engaged in the same business and are competing with it at its expense, to the grave injury and damage of its business. The decision sought to be reviewed contravenes, as we respectfully sub-

mit, the well-settled principles of law announced by the decisions of this court.

Express Cases, 117 U. S., 1.

Donovan vs. Pa. Ry. Co., 199 U. S., 279.

L. & N. R. R. Co. vs. Naval Stores Co., 198 U. S., 483.

These decisions of this court were followed in North Carolina by the Supreme Court of that State in the case of *Express Company vs. Railroad*, 111 N. C., 463.

From the decisions in the foregoing cases and from many others which might be cited, we submit that the following principles have been settled by this court with regard to the questions presented upon the record:

1. A public-service corporation is entitled to serve the public through its own instrumentalities or those of its own selection and cannot be compelled against its will to select another such corporation as an agency for its service.

2. A public-service corporation cannot be compelled against its will to give over its property or the use of its facilities to another such corporation, to be used by it in the discharge of its corporate duties.

3. A public-service corporation cannot be compelled to aid a competitor in the promotion of its business.

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Fourth Circuit, herein referred to, contravenes and is inconsistent with the foregoing principles of law, and that it ought to be reviewed by this court, and that the writ of certiorari for that purpose should be allowed. Your petitioner furnishes as Exhibit "A" to this

petition a certified copy of the entire transcript of the record in this case, including the proceedings in the Circuit Court of Appeals for the Fourth Circuit.

SOUTHERN POWER COMPANY,
By R. V. LINDABURY,
W. S. O'B. ROBINSON, JR.,
E. T. CAUSLER,
WM. P. BYNUM,
R. C. STRUDWICK,
Attorneys for Petitioner.

STATE OF NORTH CAROLINA,
County of Guilford:

Before me, the undersigned notary public in and for the foregoing county and State, personally came and appeared Wm. P. Bynum, who, being duly sworn, says that he is one of the attorneys for the petitioner herein; that he knows of the proceedings had and the facts stated in the foregoing petition; that the same are true and correct to the best of his knowledge and belief.

WM. P. BYNUM,

Subscribed and sworn to before me this the 21st day of August, 1922.

MABEL H. KASE,

[SEAL.]

Notary Public.

My commission expires March 31, 1924.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

SOUTHERN POWER COMPANY, *Petitioner*,*vs.*NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF
GREENSBORO, and CITY OF HIGH POINT, *Respondents*.**BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI.**

The Circuit Court of Appeals affirmed the ruling of the United States District Court, which held, in accordance with petitioner's contention, that the suit, though called in the complaint an application for a writ of mandamus, was in reality a suit in equity for an injunction, and that it was therefore (diversity of citizenship and the requisite jurisdictional amount appearing) properly removable from the State court into the said District Court.

It also affirmed the order made by the said District Court at the instance of petitioner enjoining further proceedings by the respondents in the State court.

These matters are therefore eliminated from consideration here.

The question now presented would seem to be: "Did the Circuit Court of Appeals err in deciding and adjudging that upon the state of facts disclosed in the record petitioner owed to the North Carolina Public Service Company the duty of furnishing electric current, manufactured and generated by the petitioner, to the North Carolina Public Serv-

ice Company for distribution and resale by the latter company at a profit to it?" Petitioner will support its application for a writ of certiorari to review this decision by endeavoring to show that it contravenes or ignores well-settled principles of law applicable to cases of this nature, and that it is a decision of such grave and vital importance, not only to the petitioner, but to the public, as to require correction in this method.

I.

The following facts are admitted upon the record or found by the trial court upon undisputed evidence:

The North Carolina Public Service Company (of North Carolina) is a public-service corporation, and by its charter it is authorized and empowered, among other things, to secure, develop, and operate hydroelectric plants and to generate electric current and to sell and distribute it. The powers granted to the Southern Power Company (of New Jersey) are in this respect the same as those possessed by the North Carolina Public Service Company (Record, page 466). There is this difference, however, between the two companies: The Southern Power Company upon receiving these chartered powers undertook, by exercising them, to discharge the obligation to the public which it had assumed; it devoted its resources, energy, and skill to manufacturing and generating hydroelectric power by the erection of dams on the Catawba River, North Carolina, and the installation of machinery and of a system of distributing this current to the consuming public. The North Carolina Public Service Company has failed to exercise the like powers conferred upon it; it has built no dams; it has installed no machinery; it

generates or manufactures no electric current, either for its own use or for sale to the public. Like the slothful and unprofitable servant of old, it has kept this talent laid up in a napkin.

On November 21, 1908, the Southern Power Company made a contract with the High Point Electric Company whereby it agreed to furnish said company electric current for its own use and for resale for ten years upon certain specific terms and conditions (Record, page 216). On December 3, 1908, the Southern Power Company entered into a contract with the Greensboro Electric Company whereby it agreed to furnish to it electric current for its own use and for resale for ten years upon certain specified terms and conditions (Record, page 235). Each of these contracts contains the following provision: "All contracts made by the said consumer for such retailing of said electric power shall be subject to this contract and the liability of the power company for any purpose shall not be considered to extend to any person or corporation other than said consumer."

The North Carolina Public Service Company thereafter acquired the property and franchises of each of these companies and succeeded to the rights of each under the said contracts.

Shortly before the expiration of the said contracts the Southern Power Company offered to make other contracts of a like import for furnishing electric current to the North Carolina Public Service Company, but for a shorter period of time and at a somewhat higher rate (Record, page 466).

The North Carolina Public Service Company refused to accede to the terms proposed by the Southern Power Company and no other contracts were ever made with it.

Pending negotiations for this purpose, the North Carolina Public Service Company notified petitioner that it could generate its own supply of electric current more advantageously than it could purchase it from petitioner, either from coal or development of a hydroelectric plant at High Rock, on the Yadkin River, N. C., and that it proposed so to do (Record, pages 144, 145, and 251).

After the expiration of these contracts and during the year 1920 the Southern Power Company continued to furnish current to the North Carolina Public Service Company in order that during this extended period it might put itself in a position to generate its own power. It notified the North Carolina Public Service Company, however, that at the expiration of the said year, to wit, on January 1, 1921, it proposed to discontinue the said service. On April 26, 1920, the Southern Power Company applied to the city of Greensboro for a franchise to enable it to distribute and sell to the said city and its inhabitants electric current. The City declined to grant this franchise. On September 3, 1920, the present suit was begun in the Superior Court of Guilford County, North Carolina. The nature of the action and the course of the litigation in the said Superior Court and in the Supreme Court of North Carolina, in the District Court of the United States, and in the Circuit Court of Appeals, culminating in the decision and judgment of that court now sought to be reviewed, appear at large in the record, have been summarized in the pending petition, and will not be repeated here.

The North Carolina Public Service Company and the Southern Power Company appear to be the only parties to this record who are substantially interested in the result of

this suit. The interests of the two cities, Greensboro and High Point, are incidental, if they have any real interest at all (Record, page 464). It appears that they have contracts under which they have been purchasing electric current from the North Carolina Public Service Company, which it secures from petitioner and resells to the cities at a considerable profit. It further appears that petitioner is ready, able, and willing to supply them directly with the same current if they will permit it to do so, and it is difficult to see how they are beneficially interested in insisting upon the interjection of a middleman into the transaction. The petitioner does not deny its obligation to furnish the North Carolina Public Service Company electric current for its own consumption, as in operating its street-railway system. It does not deny its obligation to furnish current to cities and towns to be by them distributed and resold to their inhabitants. It has always recognized and acknowledged the distinction between a municipal plant operated under legislative authority for a public purpose and restricted in its business to territorial limits of the town and the business of a private corporation organized and operated for private gain and unrestricted as to the territory in which it may operate. This distinction is adverted to in the case of *Springfield Gas & Electric Co. vs. Springfield*, decided by this court November 21, 1921, and reported — U. S., — (Record, page 184).

The learned Circuit Court of Appeals inadvertently misstated the position of petitioner in this particular. Petitioner does not deny that in rendering such service in the State of North Carolina it is subject to regulation by the proper authorities, and it admits that it cannot discriminate in its rates. Its position is that petitioner, in the absence of

a contract, owes to the North Carolina Public Service Company and other similar public-service corporations (independent vendors) no duty to furnish them electricity for resale and distribution to the public at a profit, and in competition with petitioner, in derogation of petitioner's right to distribute its own electricity to the public through its own instrumentalities or instrumentalities of its own selection. It earnestly contends that the learned Circuit Court of Appeals erred in holding to the contrary.

The correctness of the rule just stated is established by the highest authority.

Express Company Cases, 117 U. S., 1.

L. & N. R. R. Co. vs. West Coast Naval Stores Co., 198 U. S., 483.

Donovan vs. Pa. R. R. Co., 199 U. S., 279.

Express Co. vs. Railroad, 111 N. C. Rep., 463.

The principal question presented now seems to be whether or not this rule of law so clearly stated in and so firmly established by the decisions of this court is applicable to the instant case.

The learned Circuit Court of Appeals gave a qualified assent to the correctness of this proposition, but denied its application to the North Carolina Public Service Company upon the facts appearing in this record. It exempted that company (as we understand its opinion) from the operation of this rule chiefly upon the following grounds:

(1) It held that one of the chartered powers of petitioner was the right of eminent domain; that the conferring upon it of this right imposed upon it the correlative duty of serving the public in the exercise of its corporate power (Opin-

ion, page 3). And it held further that the North Carolina Public Service Company, in its capacity as an independent vendor, was a part of the public referred to.

(2) It held further that the North Carolina Public Service Company is not a competitor of the petitioner within the meaning of the rule referred to.

(3) It held that petitioner, one of whose chartered powers is the furnishing of electric current to independent vendors, is shown by the facts appearing in the record to have definitely undertaken and entered upon this particular service, and that it has thereby dedicated its property to the service of all independent vendors, including the North Carolina Public Service Company.

As to the First Ground.

Petitioner contends that this principle of law has no application to the North Carolina Public Service Company in its capacity as public vendor. The North Carolina Public Service Company is not one of the public—that is, the general consuming public—to whom petitioner admits it owes a duty. It is a middleman seeking forcibly to interject itself between the purchaser of the commodity and the general consuming public for its own selfish and self-serving purposes. Its interests are antagonistic to the interests of the public properly so called, in that its chief purpose in demanding this current from petitioner is not to consume it, but to exact and realize a profit from the consumer in the sale of the commodity to him by it.

The learned court did not advert in this connection to the fact that the same power of eminent domain conferred upon

the Southern Power Company is likewise conferred upon the North Carolina Public Service Company. If the North Carolina Public Service Company had also exercised and availed itself of its corporate powers in this respect and was, by reason thereof, a producer as well as a distributor of electric current, it would scarcely be contended that it could then compel petitioner to supply it with current for distribution and resale by it. This seems to be conceded in the opinion of the learned Circuit Court of Appeals (Opinion, page 7). The voluntary failure of the North Carolina Public Service Company to act, to exercise its corporate powers in this respect, cannot operate to make it a member of the general public entitled to exact this service from petitioner when if it had so acted it would not be so entitled. It is submitted that by its non-action the North Carolina Public Service Company can impose no additional duty upon petitioner.

As said by Chief Justice Waite in the *Express Company Cases*, 117 U. S., 28: "If the general public were complaining * * * different questions would be presented."

Much emphasis is laid in the opinion of the Circuit Court of Appeals upon the fact that its charter conferred upon petitioner the right of eminent domain. It is nowhere charged that the petitioner has exercised this or any other chartered power oppressively, unlawfully, or in any unusual manner. There is nothing in the record to justify the assertion or the assumption that it has exercised it for the purpose of serving independent vendors. The possession and the exercise of this right is often referred to by the courts as material in determining whether a corporation is a private corporation entitled to do business as such, or is a public-service corporation owing the duty of serving the public (properly so called) at

reasonable rates without discrimination and subject to proper regulation.

As petitioner has at all times admitted that it is such public-service corporation, owing said duties and subject to the said regulation, it is not perceived how the possession of the exercise of the power of eminent domain is relevant or significant in the solution of what seems to be the crucial question in this case, to wit, is the North Carolina Public Service Company in its capacity of independent vendor of electric current one of the general public to whom petitioner owes duties in like manner as it does to the general consuming public?

It is submitted that by the exercise of the power of eminent domain the Southern Power Company did not render itself liable to the imposition of this alleged duty upon it, if otherwise it would not have been so.

In so exercising it performed a duty imposed by its charter. It should not be penalized for so doing.

The learned Circuit Court of Appeals says further that the petitioner by exercising this right of eminent domain and by building and operating its extensive properties, has acquired exclusive control of the generation of electric current in the territory in which the North Carolina Public Service Company operates. If this were true, it is difficult to see how this would have any bearing upon the question presented, the status of the North Carolina Public Service Company and the measure of the duty owed to it by the petitioner, no unlawful methods on its part being alleged.

The facts, however, as we submit, do not sustain the statement referred to. It is said in the opinion that the rivers and streams in North Carolina are capable of generating

1,095,000 horse-power, and that petitioner has developed 60,000 horse-power. It appears that its developments are entirely upon one river, the Catawba. The Yadkin and the Roanoke rivers are both closer to the territory embracing Greensboro and High Point than the Catawba. There is as much hydro-electric power capable of development on each of these streams as on the Catawba River (Record, pages 147, 148).

The North Carolina Public Service Company has the same powers, including that of eminent domain, to develop hydro-electric powers on these streams or elsewhere as the petitioner has to develop the power on the Catawba River. It has failed and neglected to avail itself of its power of eminent domain and other chartered powers and the opportunity afforded it to erect a plant and put itself in a position to manufacture, generate, and distribute electric current, though it notified petitioner that it was its intention to do so. Its non-action in this particular, for which petitioner is in no way responsible, cannot, we submit, operate in any manner to change its relation to petitioner to confer upon it any right which otherwise it would not have nor impose upon petitioner any duty or burden from which otherwise it would be exempt.

As to the Second Ground.

It is respectfully submitted that the learned Circuit Court of Appeals erred in holding that the North Carolina Public Service Company is not a competitor of petitioner in the distribution and resale of electric current within the meaning of the rule relied on by petitioner. Petitioner's contention that upon the whole record it was and is such a com-

petitioner seems clearly established. The District Court, upon the undisputed evidence, found as a fact that it was (Record, page 466). The Circuit Court of Appeals says (Opinion, page 9) that if the North Carolina Public Service Company is a competitor of petitioner it is so in a restricted sense. It is submitted that the extent of the competition is not the test. If it is a competitor at all, the rule, that one competitor in business cannot demand service of another for promotion of its business, applies. *Central Stock Yards vs. L. & N. R. R. Co.*, 192 U. S., 568.

If this were not so, how could the line be drawn between competition within the rule and competition not within it? If it is seeking or endeavoring to gain what another (the petitioner, Southern Power Company) is endeavoring to gain at the same time, it is a competitor. Such competition both within and without the limits of the two cities of Greensboro and High Point clearly appears from the undisputed evidence (Record, pages 197, 199, 200, and 203).

In this connection the Circuit Court of Appeals mentions as material the fact that in the distribution and sale of its current the Southern Power Company uses an instrumentality of its own selection, the Southern Public Utilities Company, said by the court to be an offshoot or subsidiary of petitioner. If such is the case, does the petitioner thereby in any manner transcend its rights or violate the law or in any manner affect the status or the rights of the North Carolina Public Service Company either for better or for worse?

Under its charter petitioner assumed the obligation of generating, distributing, and selling to the public electric current. Its right to select its own agencies for the accomplishment of this purpose would seem to be well established;

the general public has no reason to complain of its exercise of this right and has never complained, and its competitor, the North Carolina Public Service Company, has, as we submit, no right to question it.

Speaking of the duties of public-service corporations where a similar question was presented, Chief Justice Waite said (*Express Company Cases*, 117 U. S., 1, 24) :

"So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

To the same effect are the following:

Atchison, Topeka & Santa Fe Ry. Co. vs. Denver & New Orleans R. R. Co., 110 U. S., 667.

Lewis on Eminent Domain, 3d edition, section 440.

L. & N. R. Co. vs. Central Stock Yards, 212 U. S., 132.

As to the Third Ground.

Does the record justify the conclusion announced by the Circuit Court of Appeals that the petitioner has, by custom or usage or otherwise, dedicated its property to the service of furnishing electric current to independent vendors, in-

cluding the North Carolina Public Service Company? The learned court says in this connection (Opinion, page 10):

"But when a corporation has definitely undertaken and entered upon a particular service authorized by its charter, which conferred the right of eminent domain, the obligation to perform the service is complete, its rates and terms are subject to regulation by public authority, and it must serve all alike."

Further it says:

"In this instance the Southern Power Company has definitely undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter and for that purpose has exercised the power of eminent domain conferred by the State."

Opinion, page 11.

The petitioner does not deny the correctness of the first of the foregoing excerpts from the opinion as a general proposition of law, but it does say that the facts as shown in this record do not justify its application here.

With regard to the second excerpt from the opinion just quoted, petitioner says that it is not supported by the facts disclosed in this record.

Petitioner's charter does not impose upon it the obligation to sell electricity to independent vendors. It merely gives petitioner permissive power to make such sales, just as it confers upon it the power of leasing to other corporations the right to string wires on its poles or to lease water rights.

The testimony is full, explicit, and uncontradicted that the petitioner has in no instance furnished current to inde-

pendent vendors such as the North Carolina Public Service Company, except under special contracts limiting the time for such service, the terms upon which it was to be supplied, and the rates to be charged, and restricting the force and effect of such contracts to the parties thereto in each particular instance (Record, pages 166, 167, and 143).

The substance of this testimony has been set forth somewhat at large in the petition for certiorari, to which reference is made. The finding of the trial court upon this evidence, that petitioner had never dedicated its property to the supplying of electric current to independent vendors for resale, is fully supported by this evidence, as petitioner contends, and the learned Circuit Court of Appeals was in error in overruling this finding of the trial court and holding to the contrary.

The finding of the Circuit Court of Appeals that there has been a dedication by petitioner of its property to the supplying of electric current to independent vendors seems to be unsupported by any evidence in the record, nor is there to be found in the record anything to support the statement of the Circuit Court of Appeals that petitioner has been, as a wholesaler, generally selling its current to other public utilities companies for resale, or that it is engaged in the business as a wholesaler, disposing of its current in the manner aforesaid. The evidence is undisputed that in no instance has petitioner ever sold any current to any other public-utility company except under special contract limiting the time, defining the amount, and specifying the price at which the current was to be furnished by it to that particular customer, indeed in express terms restricting to the parties to the particular contract all rights arising thereunder. It

also appears that its dealings with other public-utilities companies constitutes but a small part of its business. The learned Circuit Court of Appeals, in finding that the petitioner had so dedicated its property, seems, therefore, to have overlooked this direct and uncontradicted evidence, and further to have overlooked what this court has said and declared in a similar case was the force and effect of the furnishing of service by a public-utilities company under special contract.

If we understand the decisions of this court, the furnishing by petitioner of electric current under such special contracts, so far from establishing or tending to establish a custom or usage from which a dedication by petitioner might be inferred of its property to that use, negatives the existence thereof. In *Express Company Cases*, 117 U. S., 1, 27, this court says:

"In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads, unless specifically contracted for. * * * It has been shown, and in fact it was conceded upon the argument, that down to the time of bringing these suits no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and duties of the respective parties were carefully fixed and defined.
* * *

"In this connection it has to be kept in mind that neither of the railroads involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The con-

troversy in each case is not with the public, but with a single express company. And the real question is not whether the railroads are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freight for express companies as they carry light freight for the general public; but whether it is their duty to furnish the Adams Company or Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company."

And further, page 28:

"The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these roads, because their entry was originally under special contracts; and no other companies have ever been admitted except by agreement. * * * They were willing to begin to expand their business upon this understanding and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments upon them. If the general public were complaining because the railroads refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights."

The same rule of law is illustrated and applied by this court in *Donavon vs. Penn. Company*, 199 U. S., 279. In

this case Mr. Justice Harlan, delivering the opinion of the court upon a similar question, said:

"Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as an incident to ownership, it may use the property for the purpose of making profit for itself, such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects. It is required, under all of the circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers." But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation.

"Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that, as carriers of passengers, they are entitled to transact their business at any place which, under the authority of the law, is devoted primarily to public uses—certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to afford this particular privilege to the defendants simply because they had afforded a like privilege to the Parmelee Transfer

Company, for it had no contractual relations with the defendants, and owed them, as hackmen, no duty to aid them in their special calling."

If it should finally be held that the petitioner has irrevocably dedicated its property to the use of independent vendors, including the North Carolina Public Service Company, by having in some instances made special contracts to furnish them with electric current, the consequences to its business and to the business of all like producers of this and other commodities would be disastrous in the extreme. If such is the law, the North Carolina Public Service Company or any other independent vendor of electric current can place itself in competition with petitioner throughout the entire territory in which petitioner operates, thereby constituting itself the distributor of the electric power manufactured and generated by petitioner.

As stated by Judge Waddill in his dissenting opinion (Opinion, page 19) :

"Appellee's (petitioner's) business is sustained by its receipts from the sale of power to its customers; and if the appellant, its direct competitor, engaged in the same business, can call upon appellee to furnish to it power to resell in competition with what it produces, how long could any business withstand such a strain? In the end the public would suffer, as no well organized and strong business could long provide against the disastrous consequences that would necessarily flow from such unbusinesslike and chaotic conditions. To be wholly without means would place one in quite as good, if not a better position than that of great strength, since it could secure without risk the benefits of the labor and capital of the strong until the latter was destroyed. A more dangerous blow could not

well be struck at vested interests, and one that would eventually result in withholding capital necessary to start or maintain enterprises requiring large outlay."

Petitioner therefore respectfully submits that the grounds assigned by the learned Circuit Court of Appeals as a basis for its decision in this case are not tenable in view of the facts appearing upon the record and the rules applicable thereto; that the said decision is erroneous, and should be reversed.

II.

The petitioner is entitled to sell its electricity to the consuming public directly and through its own instrumentalities, and to require it to serve the public through the agency of the North Carolina Public Service Company would be to deprive it of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The uncontradicted evidence shows that appellee is engaged in the business of distributing to the consuming public—as well as generating—electricity. It has spent enormous sums of money in the construction of dams and hydroelectric plants, as well as steam plants, for the generation of electricity, and has also built lines and substations and other necessary parts of a well organized distribution system for the purposes of transmitting its electricity directly to the consuming public in the territory of Greensboro and High Point and has sought and still seeks to do so.

There could, we submit, be no justification for depriving appellee of the right to distribute its own electricity to the consumer and to earn the profit there is in such distribution. The electricity which ap-

pellee generates is generated for use by the consuming public. To permit the North Carolina Public Service Company to take this electricity from appellee for the purpose of distributing it through its own instrumentalities, rather than to permit appellee to distribute it would work no change in the use to which the electricity is devoted but would merely enforce a transfer of appellee's property to the Public Service Company and give to the latter the right to earn the profit incident to the distribution of the electricity, and incidentally increase the cost to the consumer.

The foregoing argument is, as we submit, sustained by the following authorities:

Atchison, Topeka & Santa Fe R. Co. *vs.* Denver & New Orleans R. Co., 110 U. S., 667.

Memphis & Little Rock R. Co. *vs.* Southern Express Co., 117 U. S., 1.

L. & N. R. R. Co. *vs.* Central Stock Yards Co., 212 U. S., 132.

For the foregoing reasons it is respectfully submitted that this court should review the decision of the Circuit Court of Appeals in this case, and that a writ of certiorari for that purpose should be granted.

R. V. LINDABURY,
W. S. O'B. ROBINSON, JR.,
E. T. CAUSLER,
WM. P. BYNUM,
R. C. STRUDWICK,
Attorneys for Petitioner,
the Southern Power Company.

FILED
SEP 29 1922

STANS
CL

IN THE

United States Supreme Court

October Term, 1922

No. 110

SOUTHERN POWER COMPANY,

Petitioner,

against

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO AND CITY OF HIGH
POINT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN W. DAVIE,
KING, SAPP & KING,
AUBREY L. BROOKS,
*Attorneys for Respondent,
North Carolina Public
Service Company.*

C. A. HINES,
*Attorney for Respondent,
City of Greensboro.*

DEED PEACOCK,
*Attorney for Respondent,
City of High Point.*

IN THE
Supreme Court of the United States
October Term, 1921

<p style="text-align: center;">SOUTHERN POWER COMPANY, <i>Petitioner,</i> <i>against</i> NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO and CITY OF HIGH POINT, <i>Respondents.</i></p>	}	No. 554
--	---	---------

**BRIEF IN OPPOSITION TO PETITION FOR
CERTIORARI.**

The essential facts as well as the law of this case lie within short compass.

The petitioner, Southern Power Company, was chartered under the laws of the State of New Jersey with power *inter alia* to generate electricity for light and power and transmit the same to consumers on its lines or "to independent venders thereof" (R., p. 364). It domesticated itself in North Carolina as a public service corporation and thereby became under the laws of that State possessed of the right of eminent domain and charged with corresponding duties.

Prior to this litigation, it had for a number of years voluntarily engaged on a broad scale in the business of selling electric current to independent venders as permitted by its charter, and was actually selling electricity at wholesale to numerous local distributing companies, manufacturing concerns and municipal corporations who, in turn, delivered it to the ultimate consumer. Among the distributing companies other than the respondent who were enjoying this service were the Leaksville Light

& Power Company, Norwood Power & Light Company, Hillsboro Power & Lighting Company, Piedmont Railway & Electric Company, Lancaster Light & Power Company, and, in addition, the Southern Public Utilities Company, an affiliate of the petitioner, which, like the others named, purchased from it electricity at wholesale and retailed it in a large number of North Carolina towns and cities.

In the production of electric current by water-power, the Southern Power Company enjoys a practical monopoly in the Piedmont region of North Carolina. The sale of this current to independent vendors like the respondent constitutes not its casual, but its current business. In the language of the petitioner's Vice President (R., p. 169):

"We do not retail current in the sense of supplying lighting customers in any incorporated town in North and South Carolina except Salisbury."

In this situation, the Southern Power Company attempted, first, arbitrarily to impose on the respondent North Carolina Public Service Company, whom it had long been serving, rates in excess of those which it was charging to like customers under similar circumstances and conditions, and, finally, to deprive it of all service whatever.

As stated in the opinion of the Circuit Court of Appeals, its claim was nothing less than that it

"owes no public service 'of transmission of current to independent vendors thereof'; that as to such service it is not subject to rules and regulations of the State Corporation Commission; that it may furnish one or many of these independent vendors to cities and towns to the exclusion of others; that it may refuse to furnish current on any terms to cities and towns themselves to be resold to their inhabitants; that it has absolute freedom of contract to discriminate in price and terms between all independent vendors, including cities and

towns; that it has the right to create its own subordinate 'independent vendor', Southern Public Utilities Company, and refuse to deal with any other on equal terms or on any terms."

In denying this claim, the Circuit Court of Appeals announced the governing principle of law as follows:

"But when a corporation has definitely undertaken and entered upon a particular service authorized by a charter which confers the right of eminent domain, the obligation to perform the service is complete, its rates and terms are subject to regulation by public authority and it must serve all alike. In such public service it cannot pick and choose its customers."

It is submitted that the writ now prayed should be refused for the following reasons:

I.

The decision of the Circuit Court of Appeals is in accord with the uniform current of authority in this and other courts. *New Orleans Gas Co. v. Louisiana Light Company*, 115 U. S., 650; *Western Union Telegraph Company v. Public Service Commission*, 230 N. Y., 95; *New York & Queens Gas Company v. McCall*, 245 U. S., 345.

It is in precise accord with the conclusions already reached by the Supreme Court of the State of North Carolina in litigation involving the same question and these same parties. *Salisbury & Spencer Railway Company v. Southern Power Co.*, 101 S. E., 593, 102 S. E., 625, 105 S. E., 28; and *North Carolina Public Service Company v. Southern Power Company*, 179 N. C., 330; 107 S. E., 226.

II.

A question so well settled will not be regarded as any longer one of public importance within the rules of this Court governing the allowance of a writ of certiorari.

III.

Where a public service corporation like the petitioner has voluntarily engaged in a class of business permitted by its charter, it must be held to have dedicated its property to that extent to the public use. It cannot escape the consequence of such dedication by entering into individual contracts with each consumer. Otherwise, by the mere process of making discriminatory contracts it could free itself from the obligation which the law imposes not to discriminate.

IV.

The claim that the North Carolina Public Service Company is a competitor of the Southern Power Company and as such not entitled to demand its service, is wholly unsupported by the facts. The question must be determined by looking not to the enumerated but unexercised powers in the charter of the North Carolina Public Service Company, but to the business in which it actually is engaged, which is selling light and power in the cities of Greensboro and High Point alone. In these cities the Southern Power Company has not and never has had a franchise, and is unable to do any business whatsoever. The action of the North Carolina Public Service Company in extending its lines to certain enterprises on the outskirts of these two cities is shown by the record to have been encouraged and assented to by the Southern Power Company (R., pp. 423-433). There is no competition whatever between the two corporations.

The Southern Power Company for several years denied all right of the State Corporation Commission of North Carolina to regulate its rate for current to any and all consumers. The North Carolina Public Service Company, by previous litigation in the State courts, forced the Southern Power Company to submit itself

to State regulation. Its rates being thus subject to State control, it can no longer have any reason for denying service to the North Carolina Public Service Company except to destroy that Company, which has no other source of hydro-electric supply, and thus strengthen the monopoly at which it aims in both the production and the sale of hydro-electric current produced by the waters of the State.

V.

The writ should be denied.

Respectfully submitted,

JOHN W. DAVIS,
KING, SAPP & KING,
AUBREY L. BROOKS,
*Attorneys for Respondent,
North Carolina Public
Service Company;*

C. A. HINES,
*Attorney for Respondent,
City of Greensboro;*

DRED PEACOCK,
*Attorney for Respondent,
City of High Point.*

United States Supreme Court, U. S.

FILED

OCT 22 1923

WM. R. STANSBURY
CLERK

IN THE
Supreme Court of the United States

October Term, 1923

No. 110

SOUTHERN POWER COMPANY,

Petitioner,

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO, and CITY OF HIGH
POINT,

Respondents.

RESPONDENT'S REPLY TO PETITIONER'S MOTION TO ENJOIN THE NORTH CAROLINA PUBLIC SERVICE COMPANY FROM FURNISHING HYDRO-ELECTRIC CURRENT AND POWER TO THE CITIZENS OF GREENSBORO AND HIGH POINT AND VICINITY, AS HERTOFORE DONE.

AUBREY L. BROOKS,
JOHN W. DAVIS,
KING, SAPP & KING,
Attorneys for Respondent,
North Carolina Public Service Company.

C. A. HINES,
Attorney for Respondent,
City of Greensboro,
DRED PEACOCK,

Attorney for Respondent,
City of High Point.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

No. 110.

SOUTHERN POWER COMPANY,
Petitioner,

vs.

NORTH CAROLINA PUBLIC SERVICE
COMPANY, CITY OF GREENSBORO,
and CITY OF HIGH POINT,
Respondents.

**RESPONDENTS' REPLY TO PETITIONER'S
MOTION TO ENJOIN THE NORTH CARO-
LINA PUBLIC SERVICE COMPANY
FROM FURNISHING HYDRO-ELECTRIC
CURRENT AND POWER TO THE CITI-
ZENS OF GREENSBORO AND HIGH
POINT AND VICINITY, AS HERETO-
FORE DONE.**

Comes now the North Carolina Public Service Company, City of Greensboro, and City of High Point, respondents, by their attorneys, and for answer to petitioner's motion to preserve what it is pleased to call the status quo, and replying specifically to the several allegations set forth in the motion, say:

I.

That it is true as alleged in paragraph one that the petitioner and respondent North Carolina Public Service Company are both public service corporations, but it is denied that the North Carolina Public Service Company is engaged in the distribution and sale of electric current in the State of North Carolina other than at Greensboro, High Point and Salisbury, and to a limited extent in the vicinity of these several places.

That it is denied that the respondent company instituted this suit to compel the petitioner to furnish current to it for re-sale, as it had theretofore been doing under special contract. The purpose of said suit is as set forth in the pleadings, and was, and is, to compel the petitioner to continue to furnish current and power to the respondent company for re-sale to the consuming public in Greensboro, High Point, and vicinity, without discrimination in rates and upon the same terms and conditions that it was and is selling other like customers.

II.

That the allegations contained in paragraph two are admitted.

III.

That the allegations contained in paragraph three are admitted, except the facts with relation to the order of the Circuit Court of Appeals continuing the service, are not stated. The facts with relation to same are as follows:

The District Court entered its decree on the 29th day of June, A. D. 1921, continuing the ser-

vice for six months. The six months period thus allowed would expire December 29th, 1921. The petitioner declined to consent to an order by the Circuit Court of Appeals continuing this service, whereupon, the respondents petitioned the court for an order continuing same, which was accordingly entered by that court on December 28th, 1921, and is as follows (Rec. P. 331):

“Whereas, the decree of the court below contains the following: ‘further ordered, adjudged, and decreed that for and during the period of six months from the date of this decree the defendant shall continue to sell and deliver to the North Carolina Public Service Company electricity for the use and benefit of said cities of Greensboro and High Point and their citizens and inhabitants, and those in the vicinities of said cities, as they are now being served by said complainant as the defendant has heretofore sold and delivered such electricity to said North Carolina Public Service Company,’ and it appearing to the court that said six months will expire on December 29th, 1921, it is now here ordered that said period of six months be, and the same is hereby extended with the same terms and provisions until the further order of this court.

MARTIN A. KNAPP,
Senior Circuit Judge,
December 28th, 1921.”

The same day, to-wit, Dec. 28th, 1921, a certified copy of said order was transmitted to the U. S. District Court, at Greensboro, North Carolina.

IV.

That as to the allegations contained in paragraph four, it is admitted that the respondent

Public Service Company has in a few instances extended its lines within the City of Greensboro and High Point and the vicinities of said cities, to accommodate the normal and usual growth and demand of cities of this size in North Carolina, but it denies that such increase in electricity taken from petitioner's system has been other than was contemplated by the court in entering its original decree and by the Circuit Court of Appeals in continuing this service, and is no greater than is necessary to supply the daily needs of the inhabitants.

That the Circuit Court of Appeals in express terms directed that the petitioner should continue to furnish current for the use and benefit of the cities of Greensboro and High Piont and their citizens and inhabitants and those in the vicinities of said cities as they are now being served, and that they should so continue until the further order of the court. The opinion and final order of the court was filed May 10th, 1922, expressly providing that the petitioner had no grounds for its refusal to furnish current to the Public Service Company, and concludes its opinion with the statement that

"the rates and terms upon which current is furnished to the North Carolina Public Service Company and other corporations doing like business are of course subject to the rules and regulations of the North Carolina Corporation Commission."

No suggestion or intimation was made either in brief or argument before the Circuit Court of Appeals that the respondent Public Service Company should not be allowed to take any additional current for the use and benefit of the cities in their normal growth. As the petitioner

has no lines in either of said cities, and is not engaged in the retail business, there was and is no other source of supply open to such citizens. During a period of more than ten years past, the respondent Public Service Company has gradually increased the amount of current taken and distributed, and such course of dealing was expressly recognized in the decree when it was stated that they should continue to furnish current "as they are now being served by said complainant, as the defendant has heretofore sold and delivered such electricity to the North Carolina Public Service Company."

V.

That the allegations contained in paragraph five are substantially correct.

VI.

That the allegations contained in paragraph six are inaccurate and untrue. That the facts with relation to the matters therein referred to are as follows:

The cities of Greensboro and High Point are both situate in Guilford County, about sixteen miles apart, and are connected by a hard surface highway; that on this highway, about five miles from High Point, is situate the little village of Jamestown, unincorporated, and without any means of lighting the homes of its citizens. That the respondent Public Service Company, at the urgent request of these citizens, has extended its line in order to afford lighting for their homes; that there are only ninety-three (93) customers on this line and no shoe factory, nor any motors of any description are connected

with same; that the quantity of electric current necessary to supply the needs of these additional consumers is the approximate output of a 4 Kilowatt generator operating ten hours per day. This line and service was installed at a loss to the respondent Public Service Company, and solely as a matter of convenience and accommodation to these people to light their homes, a public High School building, and a County Tubercular Hospital. That the Armour Fertilizer Company, Swift & Company, American Agricultural Chemical Company located a number of years ago small mixing and distributing plants at Greensboro; that with the knowledge, consent and approval of the petitioner, who had no lines connecting with these plants, the respondent Public Service Company built transmission lines to same and began serving them current necessary for their business. The amount of current has from time to time increased with the normal growth of the business, and the average increase in consumption since the entering of the original order in this case has been no greater than during like previous periods; that the Carolina Steel & Iron Company is a small concern and its increased demand can be taken care of with a seventeen Horse Power generator operating ten hours a day for 312 days a year; that it is untrue and denied that the respondent Public Service Company has entered upon the property of petitioner adjacent to its sub-station at Greensboro and has undertaken to install upon said property electrical transformers of any description.

VII.

As to the allegations contained in paragraph seven, respondent Public Service Company denies,

that it is taking any power from the petitioner unlawfully, or doing anything in the premises contrary to the express decree of the United States Circuit Court of Appeals, and that unless and until this decree is abrogated, the petitioner has no cause of complaint.

VIII.

That as to the allegations contained in paragraph eight, the same are untrue and denied; that the petitioner's equipment and current supply both at High Point and Greensboro are ample and sufficient to take care of the relative small demands made upon it by the respondents; that the petitioner in 1909 built in Greensboro a brick sub-station and installed therein three 1,000 K. V. A. transformers, a total capacity of 3,000 K. V. A.; that this respondent was then and has ever since been the only customer which the petitioner serves through these transformers; that on June 1st, 1923, the maximum load on these transformers was 2,400 kilowatts; that the transformers of the type installed at petitioner's sub-station can operate efficiently and economically under a 25% overload.

That the petitioner, in 1909, constructed a sub-station in High Point with three transformers, each having a capacity of 1,500 K. V. A., or a total capacity of 4,500 K. V. A. At this time, and for a number of years thereafter, the respondent Public Service Company was the only customer which the petitioner served from this sub-station; that on June 1st, 1923, the maximum load of the respondent was 2,650 Kilowatts; that several years after the respondent began taking current through this sub-station, the petitioner connected up two cotton mills

with same, located outside of the City of High Point, and has been since serving these two said mills through this sub-station; that the respondents are advised that one of the cotton mills uses approximately 520 Kilowatts, and the other 840 Kilowatts; that one of the mills has within the last few months added 5,000 additional spindles, and this additional load has been imposed upon this sub-station.

That the allegation that the respondent Public Service Company is overtaxing the transformers in either Greensboro or High Point is untrue in fact and whatever excessive load may be added to the High Point transformers is due to the direct action of the petitioner in increasing its own load upon same.

IX.

The allegations contained in paragraph nine are admitted.

For further answer, the respondents say:

I.

That petitioner's transformer stations at Greensboro and High Point are not overtaxed, and the amount of current taken constitutes no danger to the petitioner's transmission system, but if it did, the remedy is both simple and inexpensive. These transformer stations are constructed in units, varying in size. They may be and are enlarged by adding additional units to the sections already placed.

II.

The respondents aver that the assertion by the petitioner of its inability to continue to serve

current at Greensboro and High Point, and the great damage that is likely to result to petitioner's property by the insignificant increase in the consumption is unfounded in fact and unsupported by evidence. The petitioner, in 1920, filed a petition with the City of Greensboro, asking the privilege to render the same character of service which it is now complaining of the respondent Public Service Company's giving. In Section 7 of this petition (Rec. p. 237), it makes the following declaration:

"Your petitioner recognizes its obligation to furnish your city and citizens whatever electricity shall be needed for municipal and domestic consumption in preference to its customers, who only need, or use, the same for industrial purposes, provided your Honorable Board will grant it a franchise to enable it to discharge this public duty, or obligation; as it claims, and hereby asserts, the right to render such service directly to the city and citizens of Greensboro, to whom alone it is responsible, and not through the medium of the North Carolina Public Service Company, to whom it owes no public duty whatever. It, therefore, hereby applies to this Honorable Board for a franchise to construct, maintain and operate in said city, and along and over its streets, and other public places therein, the necessary transmission lines, poles, appliances, etc., to enable it to furnish and supply the city and its citizens with electricity required by them for municipal, domestic and other purposes, hereby assuring your Honorable Board that should said franchise be granted within the time hereinafter stated, it will be ready, able and willing to supply your city, and its citizens, with the above mentioned service, on and after January 1, 1921, for such time and upon such terms as may be agreed upon."

In addition to petitioner's ability and readiness to render this service at that time, it has greatly supplemented its capacity for public service in this regard by developing large additional hydro-electric power units and installing many more instrumentalities, as evidenced by its declaration in its petition filed with the North Carolina Corporation Commission on the 13th day of October, 1923, asking for additional increase in rates over a former increase previously allowed by the Commission, which granted an extra charge of 10% for current sold other public utility companies. The declaration is as follows:

"That following said order of July 8th, 1921, petitioner took immediate steps to enlarge its facilities for the generation and distribution of electric power, and in this connection has caused to be constructed at great cost a large hydro-electric plant at Mt. Island in the counties of Gaston and Mecklenburg, State of North Carolina, having a capacity of about 80,000 Horse Power, and a large hydro-electric plant at Great Falls, South Carolina, known as the Dearborn Station, and having a capacity of about 60,000 Horse Power, and has erected two large steam plants, one at Mt. Holly, in the County of Gaston, and the other near University Station, in the County of Orange, State of North Carolina, and has built numerous transmission and distribution lines, sub-stations and other apparatus and appliances for the transmission and distribution of electric power to the consuming public of this state."

The respondents are advised and believe that the two steam plants above referred to at Mt. Holly and University Station have a combined rated capacity of about 60,000 Horse Power,

making a total of increased constructed Horse Power since the original decree was entered in 1921 of about 200,000 Horse Power. That the above newly constructed plants operated at capacity of 24 hours a day, 312 days a year, have an annual output of approximately 1,123,200,000 Kilowatt hours. This, added to the 300,000 Horse Power capacity of the petitioner theretofore in use, as ascertained by the Circuit Court of Appeals, makes a total capacity of 500,000 Horse Power, thus comprising a total capacity under the control of the petitioner of approximately 2,808,000,000 Kilowatt hours, plants operated at capacity of 24 hours a day, 312 days a year.

That the petitioner, having thus greatly enlarged its capacity and instrumentalities for service after the rendition of the decree by the United States District Court herein, took on many new customers, and transmits over its lines through High Point and Greensboro to Reidsville and other points, large quantities of additional current, which is sold to new customers.

III.

That since the original decree was entered in the U. S. District Court, the petitioner has greatly enlarged its capacity for service to the consuming public in North Carolina, as well as enlarging and amplifying its mechanical instrumentalities for better service, and particularly with relation to Greensboro and High Point. That among other things, the petitioner has built a large transmission line from its extensive hydro-electric development at Lookout Shoals, N. C., to Winston Salem and to Greensboro, and from Lookout Shoals to Salisbury, thus connect-

ing with its main transmission line to the south of High Point and to the north of Greensboro.

IV.

The respondents are advised that the Southern Power Company furnishes transformers for all of its sub-stations both in North Carolina and South Carolina and carries in stock a number of transformers of different capacity, and if it had the disposition, could, with little expense and inconvenience, relieve any possible danger from the alleged excessive load either in Greensboro or High Point. That in this connection your respondents are advised, believe and aver that the petitioner, Southern Power Company, within the last twelve months has connected its transmission line with the Caldwell Power Company, an independent vendor of current in the cities of Morganton and Lenoir, North Carolina, and has installed at its own expense in sub-stations at each of these places transformers similar in character to those now in use at Greensboro and High Point, and is distributing its current to the said Caldwell Power Company through these transformers for re-sale in the two said cities. Respondents file herewith the affidavit of Edward W. Myers, to that effect marked "Exhibit A."

V.

That your respondents deny that they have changed the status quo since the rendition of the Circuit Court of Appeals in this case, and that this petition is unfounded, for that the status quo is not as defined by the decree of the District Court, but as stated in the opinion of

the Circuit Court of Appeals, and particularly, in the following paragraph of that opinion:

"In this instance, the Southern Power Company has definitely undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter, and for that purpose has exercised the power of eminent domain conferred by the State. It cannot now be heard to say that it owes no public duty with respect to that service, and that it may pick and choose its customers and arbitrarily discriminate among them."

VI.

That the petitioner, Southern Power Company, is selling current to many other independent vendors of current in North and South Carolina. The two largest cities in North Carolina, Charlotte and Winston Salem, are being thus served, and the petitioner is maintaining sufficient transformer stations in each of these cities, and in all other cities furnished through independent vendors to supply the increasing demands for current made necessary by their growth and development. That the effort to discontinue such service to these respondents is an additional discrimination which the petitioner seeks to impose in violation of its duty as declared by the U. S. Circuit Court of Appeals.

VII.

That the total consumption of current by the respondent company from June 1st, 1922, to June 1st, 1923, in both Greensboro and High Point as stated in petitioner's motion is less than 1% of the petitioner's total capacity output.

WHEREFORE, your respondents pray that this honorable court will dismiss the motion and affirm the decree of the United States Circuit Court of Appeals, and require the petitioner to continue furnishing electric service to the respondents as it has heretofore been ordered to do, and in such quantities as is reasonably necessary to take care of the normal demands of your respondent Public Service Company to supply the needs of the cities of Greensboro and High Point, and their vicinities.

This the 19th day of October, 1923.

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO,
CITY OF HIGH POINT,

By AUBREY L. BROOKS,
JOHN W. DAVIS,
KING, SAPP & KING,
Attorneys for Respondent
North Carolina Public
Service Company.

C. A. HINES,
Attorney for Respondent
City of Greensboro.

DRED PEACOCK,
Attorney for Respondent
City of High Point.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

Before me, the undersigned Notary Public in and for the foregoing county and state, personally came and appeared L. H. HOLE, JR., who being duly sworn, says that he is Secretary & Treasurer of the North Carolina Public Service Company, the respondent herein; that he has read the foregoing reply to the petition filed in this cause and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to such matters he believes it to be true.

L. H. Hole, Jr.
*jr.*

Sworn to and subscribed
 before me this *19th*
 day of October, 1923.

WM H. BRUDEN

NOTARY PUBLIC, BRONX COUNTY No. 32
 CERTIFICATE FILED IN NEW YORK COUNTY NO. 327

Exhibit A.

NORTH CAROLINA
GUILFORD COUNTY.

E. W. MYERS, first being duly sworn, says: That he is a Civil Engineer, and a member of the firm of Ludlow, Engineers, of Winston-Salem, North Carolina; that he is familiar with a local public utility company situate at Lenoir, North Carolina, now known as the Caldwell Power Company; that the former owners of this property about eighteen months ago were arranging to dispose of same to the present owners, and affiant made a physical valuation of said property; that Mr. A. M. Kisler of Morganton is the principal owner and controller of the present Caldwell Power Company, which took over this property, and now operates in and around Lenoir and Morganton, North Carolina; that the former Company purchased a portion of its power from a small, independent hydro-electric development near Lenoir, and supplemented this with a steam plant in Lenoir; that after the purchase of the present Power Company, now known as the Caldwell Power Company, Mr. Kisler and his associates within the last twelve months connected up these properties with the Southern Power Company's transmission lines, and it has since purchased current from that Company; that the Caldwell Power Company re-sells current for lighting and local purposes in Morganton and Lenoir and to industrial industries situated in and around these two places.

This 8th day of October, 1923.

EDW. W. MYERS.

Sworn to and subscribed before me,
this 8th day of October, 1923.

FLORENCE E. MONROE
Notary Public.

My Commission expires March 17th, 1925.
(Seal)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. **554**

SOUTHERN POWER COMPANY, PETITIONER

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO, AND CITY OF HIGH POINT, RESPONDENTS.

MOTION OF PETITIONER THAT, PENDING THE FINAL DETERMINATION OF THIS CAUSE, THE NORTH CAROLINA PUBLIC SERVICE COMPANY BE RESTRAINED FROM INCREASING THE AMOUNTS OF ELECTRICITY TAKEN BY IT FROM PETITIONER'S HYDRO-ELECTRIC SYSTEM AT GREENSBORO AND HIGH POINT, NORTH CAROLINA, IN EXCESS OF THE AMOUNTS FIXED BY PROVISION OF THE DECREE OF THE DISTRICT COURT, ENTERED JUNE 29TH, 1921, WHICH PROVISION WAS EXTENDED BY ORDER OF THE CIRCUIT COURT OF APPEALS.

Comes now the Southern Power Company, petitioner, by its attorneys, and moves this honorable court that it will by proper process restrain the North Carolina Public Service Company, pending the final determination of this cause by this honorable court,

from increasing the amounts of electricity to be taken by said North Carolina Public Service Company from petitioner's hydro-electric system at Greensboro and High Point, North Carolina, for the purposes of resale and distribution, in excess of the amounts which said North Carolina Public Service Company was taking at said points on and prior to the entry of the decree of the District Court herein on the twenty-ninth day of June, A. D., 1921.

The object of this motion is that pending the final determination of this cause, the *status quo* of the parties may be preserved, as first fixed by the terms of the decree of the District Court (Page 322 of the Record), and as subsequently further provided by the order of the Circuit Court of Appeals while this cause was pending before that honorable court (Page 331 of the Record).

Petitioner respectfully shows the court, in support of this motion, the following facts, to-wit:

I.

Both petitioner, the Southern Power Company, and the North Carolina Public Service Company are public service corporations engaged in the distribution and sale of electric current and power to the consuming public in the State of North Carolina.

This suit was instituted by the North Carolina Public Service Company and its co-respondents, the Cities of Greensboro, North Carolina, and High Point, North Carolina, to compel petitioner to continue furnishing to the North Carolina Public Service Company electricity for resale and distribution by said

North Carolina Public Service Company to its customers in the Cities of Greensboro and High Point, as petitioner had been heretofore doing under special contracts which had expired by limitation of time prior to the institution of this suit.

II.

The District Court, after final hearing, entered its decree which in part was as follows:

"That the complainants have no legal right to require and compel the defendant (petitioner) to sell and deliver electricity to the complainant, North Carolina Public Service Company, for resale and distribution by said North Carolina Public Service Company to said Cities of Greensboro and High Point and their citizens and inhabitants and to the other customers of said North Carolina Public Service Company, and that the complainants are not entitled to have the defendant enjoined from discontinuing the sale and distribution of electricity to said North Carolina Public Service Company for such uses and purposes." (Page 321 of the Record).

Upon the appeal of the North Carolina Public Service Company to the United States Circuit Court of Appeals for the Fourth Circuit, the decree of the District Court was modified (Page 344 of the Record) and thereafter, the mandate of the Circuit Court of Appeals in the meantime having been stayed, the Record was brought into this court in response to a writ of certiorari and the cause is now pending undetermined in this court.

III.

The United States District Court, notwithstanding its decree that the North Carolina Public Service Company was not entitled to have petitioner enjoined from discontinuing the sale and delivery of electricity to said North Carolina Public Service Company for resale and distribution in the Cities of Greensboro and High Point, incorporated in the decree the following:

"The Court is, however, desirous of incorporating in this decree such reasonable terms as will afford the complainants, Cities of Greensboro and High Point, an opportunity to make such arrangements as they may be advised to make in order that said cities of Greensboro and High Point and their citizens may not be deprived of the use and benefit of electric current and power for the uses and purposes heretofore and now enjoyed by them, and also to afford the complainant, North Carolina Public Service Company, an opportunity to make such arrangements as it may be advised to make in order to continue the persecution of its business,"

and provided.

"That the Court in the exercise of its discretion and in order, as hereinbefore recited, to afford the cities of Greensboro and High Point an opportunity to make such arrangements as they may be advised to make whereby said cities may not be deprived of the use and enjoyment of electric current and power for the uses and purposes aforesaid heretofore and now enjoyed by them,

as well as to afford the North Carolina Public Service Company an opportunity to make such arrangements as it may be advised to make to enable it to continue to prosecute its business, further orders, adjudges and decrees that for and during the period of six months from the date of this decree the defendant shall continue to sell and deliver to the North Carolina Public Service Company electricity for the use and benefit of said cities of Greensboro and High Point and their citizens and inhabitants and those in the vicinities of said cities as they are now being served by said complainant, as the defendant has heretofore sold and delivered such electricity to said North Carolina Public Service Company, upon condition, however, that the complainant, North Carolina Public Service Company, duly and promptly make the payment and make and execute to the defendant the bond hereinbefore provided for on account of the electricity heretofore and since January 1, 1921, sold and delivered to it by the defendant."

While the cause was pending before the Circuit Court of Appeals, it entered its order that the six months period during which petitioner should continue to sell and deliver electricity to the North Carolina Public Service Company for resale and distribution should be continued until the further order of the court, subject to the terms and provisions set forth in the decree of the District Court (Page 331 of the Record). No further order providing for the continued

sale and delivery of electricity by petitioner to the North Carolina Public Service Company, pending the final determination in this cause, has been made, either by the District Court or by the Circuit Court of Appeals.

IV.

Since the decree of the District Court, which was entered on the twenty-ninth day of June, 1921, the North Carolina Public Service Company has extended its distribution lines for the sale of electricity in the Cities of Greensboro and High Point and in the territories adjacent to said cities, and has very substantially increased the amounts of electricity taken from petitioner's system, both at Greensboro and at High Point, beyond the amounts which said North Carolina Public Service Company was taking at the time of said decree or had ever taken theretofore.

V.

That as hereinbefore stated, the decree of the District Court was entered on the twenty-ninth day of June, A. D., 1921. For the twelve months period between July 1, 1920, and July 1, 1921, the amount of electricity taken by the North Carolina Public Service Company from petitioner at High Point, North Carolina, was 6,538,600 kilowatt hours and this was the greatest amount of electricity which had ever been taken by said North Carolina Public Service Company during any like period of twelve months; that following the entry of said decree, the North Carolina Public Service Company took from petitioner's system at High Point, North Carolina, for

the twelve months period between July 1, 1921, and July 1, 1922, 9,060,200 kilowatt hours, and for the eleven months period between July 1, 1922, and June 1, 1923, the amount taken at said point was 10,124,624 kilowatt hours. Petitioner hereto attaches a statement showing the amounts of electricity taken from its system at High Point, North Carolina, by the North Carolina Public Service Company, month by month during the respective periods just referred to, which statement is marked as "Exhibit 1" and asked to be taken as a part of this motion.

During the twelve months period from July 1, 1920, to July 1, 1921, the North Carolina Public Service Company took from petitioner's system at Greensboro, North Carolina, 8,754,200 kilowatt hours of electricity. During the twelve months period from July 1, 1921, to July 1, 1922, the amount taken by the North Carolina Public Service Company, at Greensboro was 10,069,600 kilowatt hours, and during the eleven months period from July 1, 1922, to June 1, 1923, the amount taken at said point was 11,475,700 kilowatt hours. Petitioner attaches hereto a statement showing the amounts of electricity taken by the North Carolina Public Service Company at Greensboro, North Carolina, month by month, during the periods referred to, which statement is marked "Exhibit 2," and asked to be taken as a part of this petition.

VI.

The North Carolina Public Service Company now has under construction a line extending from High

Point, North Carolina, to Jamestown, North Carolina, a distance of some five or six miles from High Point and, as petitioner is informed and believes, the North Carolina Public Service Company proposes to connect this Jamestown Line with its High Point system and to take electricity from petitioner at High Point for resale and distribution in Jamestown and vicinity. That as petitioner is further informed and believes, it is the purpose of the North Carolina Public Service Company to take on between one hundred twenty-five (125) and one hundred fifty (150) new customers on said Jamestown Line, including a shoe factory. That as petitioner is informed and believes, the North Carolina Public Service Company has not only extended its distribution lines within the City of Greensboro but has also extended the same into the adjacent territory beyond said city and since about January 1, 1923, has taken on some eighty-five (85) new customers outside of said City of Greensboro. That said North Carolina Public Service Company has very substantially increased the amount of electricity which it is reselling at Greensboro to the following group of industrial enterprises, to-wit: "Armon Fertilizer Company," "Swift and Company," "American Agricultural-Chemical Company," and "Carolina Steel and Iron Company," and in order to make delivery of said increased amounts of electricity to said industrial enterprises, as well, as petitioner is informed and believes, to further increase the resale of electricity to said enterprises, said North Carolina Public Service Company has entered upon the

property of petitioner adjacent to its sub-station at Greensboro and is undertaking to install upon said property three large electrical transformers of the capacity of two hundred fifty (250) K. V. A. each.

VII.

That so long as petitioner is required to permit the North Carolina Public Service Company to maintain a connection between its lines and those of petitioner at Greensboro and High Point, North Carolina, it is unable to regulate, control or restrict the amounts of electricity taken by said North Carolina Public Service Company from the system of petitioner at said points or to control or restrict said North Carolina Public Service Company as to the territory in which it may resell and distribute said electricity. That the only way in which petitioner can protect itself and keep said North Carolina Public Service Company from unlawfully taking its electricity for resale and distribution is to shut off altogether the supply of electricity to said North Carolina Public Service Company at Greensboro and High Point and, as petitioner is advised and believes, it cannot do this without violating the terms of the decree of the District Court, as extended by the order of the Circuit Court of Appeals, requiring petitioner to continue to sell and deliver to the North Carolina Public Service Company electricity for resale and distribution in Greensboro and High Point, as petitioner was selling and delivering the same at and prior to the entry of the decree of the District Court.

VIII.

That the action of the North Carolina Public Service Company in extending its lines in and around Greensboro and High Point and in increasing the amounts of electricity which it is taking from petitioner's system at said places is not only, as petitioner is advised and believes, a violation by said North Carolina Public Service Company of the terms and provisions of the decree of the District Court, as extended by the Circuit Court of Appeals, but constitutes a serious and ever present menace to petitioner's stations at each of these places through which it supplies electricity. The increased amounts of electricity taken by said North Carolina Public Service Company have already overloaded petitioner's transformers at Greensboro and High Point and it is inevitable that, if such overloading continues, said transformers will be destroyed, with the result that at High Point petitioner will be left unable to supply any electricity whatsoever, either to its own customers with whom it has outstanding contracts for service, or to the North Carolina Public Service Company, while at Greensboro petitioner's service to its own customers will be very seriously impaired and it will be unable to supply any power whatsoever to the North Carolina Public Service Company. That in the event of damage to or destruction of such transformers, it will require several months to repair or replace them and will involve loss and damage to petitioner's tangible property amounting to many thousands of dollars, and will result in interruption of petitioner's business and damage to its reputation for

efficient and dependable service to the further serious irreparable loss and damage to petitioner, which loss and damage will be well nigh, if not altogether, impossible to estimate in dollars and cents.

IX.

That petitioner has made demand upon said North Carolina Public Service Company that it restrict its takings of electricity from petitioner's system at Greensboro and High Point, respectively, so that such takings will not exceed the amounts which said North Carolina Public Service Company was taking at and prior to the entry of the decree of the District Court on June 29, 1921, but said North Carolina Public Service Company has failed and refused to comply with said demand.

WHEREFORE your petitioner respectfully prays this honorable court to restrain said North Carolina Public Service Company, pending the final determination of this cause, from taking from petitioner's electrical system at Greensboro and High Point, respectively, electricity in excess of the amounts which said North Carolina Public Service Company was and had been taking at and prior to the entry of the decree of the District Court in this cause on the twenty-ninth day of June, 1921, and from extending its lines and taking on other and additional customers to be served by it with electricity taken from petitioner's already overloaded system.

This fourteenth day of June, A. D., 1923.

SOUTHERN POWER COMPANY,

By W. P. BYNUM,
R. V. LINDABURY,
E. T. CANSLER,
R. C. STRUDWICK,
W. S. O. B. ROBINSON, JR.
Attorneys for Petitioner.

STATE OF NORTH CAROLINA,
COUNTY OF MECKLENBURG.

BEFORE me, the undersigned Notary Public in and for the foregoing county and state, personally came and appeared CHAS. I. BURKHOLDER, who being duly sworn, says that he is Vice-President and General Manager of the Southern Power Company, petitioner herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief and as to such matters, he believes it to be true.

CHAS. I. BURKHOLDER.

Sworn to and subscribed before me this fourteenth day of June, A. D., 1923.

JAMES S. SEASE,
*Notary Public, Mecklenburg
County, N. C.*

My commission expires June 17, 1923.

EXHIBIT 1

STATEMENT OF K. W. HRS. OF POWER
TAKEN FROM SOUTHERN POWER COM-
PANY BY NORTH CAROLINA PUBLIC
SERVICE COMPANY AT HIGH
POINT, N. C.

	1920	1921	1922
July	571,000	701,700	831,900
Aug.	612,500	644,500	915,600
Sep.	597,600	697,400	863,900
Oct.	549,600	757,700	887,000
Nov.	530,300	804,500	869,000
Dec.	505,000	757,800	860,600
	1921	1922	1923
Jan.	525,100	863,800	1,021,000
Feb.	515,800	760,700	927,524
Mch.	574,200	810,000	1,029,000
Apr.	508,000	704,000	913,700
May	514,000	773,900	1,005,400
June	535,500	784,200	.....
Totals	6,538,600	9,060,200	10,124,624

EXHIBIT 2

STATEMENT OF K. W. HRS. OF POWER
TAKEN FROM SOUTHERN POWER COM-
PANY BY NORTH CAROLINA PUB-
LIC SERVICE COMPANY, AT
GREENSBORO, N. C.

	1920	1921	1922
July	604,500	812,500	885,800
August	646,900	643,100	909,000
Sept.	748,000	850,600	1,145,200
October	821,100	882,500	1,116,900
November	790,100	894,500	1,112,700
December	863,300	897,800	1,071,700
	1921	1922	1923
January	855,400	959,100	1,157,600
Feb.	744,600	836,600	1,021,700
March	733,500	845,700	1,089,500
April	705,700	783,500	1,003,400
May	642,000	775,900	962,200
June	599,100	887,800	.....
Totals	8,754,200	10,069,600	11,475,700

U.S. SUPREME COURT, D.
F. 13, 1119
OCT 2 1923

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 110

SOUTHERN POWER COMPANY, Petitioner

**NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO, and CITY OF HIGH
POINT, Respondents.**

NOTICE OF MOTION AND PETITION TO MAINTAIN THE STATUS QUO PENDING THE DETERMINATION OF THE SUIT IN THIS COURT, AND BRIEF IN SUPPORT THEREOF.

**W. P. BYNUM,
R. V. LINDAFURY,
E. T. CANSLER,
W. S. O'B. ROBINSON, Jr.,**
*Attorneys for Petitioner, the
Southern Power Company.*

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 110.

SOUTHERN POWER COMPANY, Petitioner

v.

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO, AND CITY OF
HIGH POINT, Respondents

NOTICE.

TO THE NORTH CAROLINA PUBLIC SERVICE COMPANY AND TO
A. L. BROOKS, ITS ATTORNEY; TO THE CITY OF GREENSBORO
AND TO CHARLES A. HINES, ITS ATTORNEY; AND TO THE
CITY OF HIGH POINT AND TO DRED PEACOCK, ITS ATTOR-
NEY:—

This is to notify you that the petitioner will on Monday, the
22nd day of October, 1923, present to the Supreme Court of
the United States in its court room in Washington, D. C., its
motion for an order maintaining the *status quo* in this suit
pending the final determination thereof by that Court by
restraining the North Carolina Public Service Company pend-
ing the final determination from increasing the amounts of
electricity to be taken by the said Company from the petition-
er's hydro-electric. system at Greensboro and High Point,
N. C., for the purpose of resale and distribution in excess of

the amounts which the said North Carolina Public Service Company was taking at the said points on and prior to the entry of the decree of the District Court herein on the 29th day of June, A. D. 1921, and a copy of the said motion and of the said petition and of the brief accompanying the same are herewith delivered to you, this the 1st-----day of

October-----1923.

SOUTHERN POWER COMPANY,
By

W. P. BYNUM,

R. V. LINDABURY,

E. T. CANSLER,

W. S. O'B. ROBINSON, JR.

Its Attorneys.

Receipt is acknowledged of the foregoing notice, and of
the motion, petition and brief in support of same. This
the 1st day of October 1923.

Attorney for the North Carolina Public Service Company.

Attorney for the City of Greensboro.

Attorney for the City of High Point.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 110.

SOUTHERN POWER COMPANY, Petitioner,

v.

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO AND CITY OF
HIGH POINT, Respondents.

BRIEF IN SUPPORT OF MOTION AND PETITION TO MAINTAIN
THE STATUS QUO PENDING DETERMINATION OF THE SUIT
IN THIS COURT.

I.

FACTS OF THE CASE

The facts of this case are set forth in the petition for certiorari heretofore filed and granted. A summary of the facts sufficient to show the violation, both present and threatened, of the decrees of the District Court and of the Circuit Court of Appeals, by the respondent Public Service Company, the resulting injury to the petitioner and destruction of the *status quo* pending the determination of the suit on the merits, and the necessity for the application made to the Court in this motion, are to be found in the printed motion and petition herewith filed.

II.

THE LAW OF THE CASE

The law of the case bearing upon the matters to be argued

upon the merits in this court we understand to be as shown in the authorities cited by petitioner in its petition for the writ of certiorari, heretofore granted by this court, and in petitioner's brief in support of said petition for certiorari, filed herewith.

III.

ARGUMENT UPON THIS MOTION

1. *The purpose and the effect of the decree below were to maintain the status quo as of the time of the entry of the decree of the District Court.*

The portions of the decree of the District Court quoted on pages 4 and 5 of the printed motion and petition show that the court only required petitioner to "continue to sell and deliver to the North Carolina Public Service Company electricity for the use and benefit of said cities of Greensboro and High Point and their citizens and inhabitants and those in the vicinities of said cities as *they are now being served by said complainant, as the defendant (petitioner) has heretofore sold and delivered such electricity to said North Carolina Public Service Company.*"

The purpose and the effect of this provision were plainly to continue the then *status quo* for the period of six months in order, as the court expressly declared, that the two cities and the Public Service Company might be afforded opportunity to make such arrangements as that they should not be left without electricity as the result of the holding by that court that petitioner could not be compelled to furnish electricity to the respondent Public Service Company to be re-sold by it as an independent vendor. This provision temporarily maintaining the *status quo* was incorporated in the decree altogether in the interest of the respondents.

While the cause was pending before the Circuit Court of Appeals, that court entered its order that the six months period during which petitioner should continue to sell and deliver electricity to the North Carolina Public Service Company for re-sale and distribution should be continued *until the further order of the court, subject to the terms and provisions set forth in the decree of the District Court.* (See record, page 331, page 5 printed motion.) No further order providing for the continued sale and delivery of electricity by petitioner to respondent Public Service Company, pending the final determination of this cause in this court, has been made, either by the District Court or by the Circuit Court of Appeals or by this court.

It results that the decrees of both courts below have been strictly limited to directing petitioner to continue to serve the Public Service Company and the two cities "as they are now being served by the said complainant, as the defendant (petitioner) has heretofore sold and delivered such electricity to said North Carolina Public Service Company." In other words the petitioner is directed, pending the determination of this cause, and purely in the interests of the respondents, to maintain the *status quo* existing as of the time of the rendition of the decree of the District Court. This direction by the courts has been obeyed by petitioner and has been deliberately violated by respondent Public Service Company.

The question presented by this motion is whether this court will allow the respondent in whose favor that status was established by the lower courts' decree, deliberately to destroy it to the irreparable damage of petitioner.

2. *Respondent Public Service Company has violated the terms of the decrees below and unless restrained will continue in such violation, destroying the status quo in its own interest and to the irreparable injury of petitioner.*

Petitioner has undertaken and has at all times been ready, able and willing to do what the courts below have ordered it to do, to-wit, continue pending the final determination of the suit, to furnish electricity to respondent in amounts in which it was furnishing it at the time of the decree of the District Court.

But, as shown in the petition, there exists the peculiar technical fact that petitioner cannot control or regulate the amount of electricity taken from it by respondent Public Service Company. Since petitioner is directed by the decrees of the courts to maintain connection with that respondent, it is within the power of that respondent to take from petitioner any amount of electricity it may choose to take. Petitioner can do nothing but violate the courts' decrees by absolutely shutting off the power, or leave respondent Public Service Company, in the absence of restraint by the court, free to take from it an unlimited amount of electrical power.

The respondent Public Service Company, taking advantage of this technical fact, has refused to be satisfied with that which the courts' decrees have guaranteed to it, the same service, the same amount of power that it was getting when the decree of the District Court was entered.

It has itself increased the amount of power taken by it from petitioner at High Point from the annual amount furnished it during the twelve months immediately preceding the District Court's decree of 6,538,600 K. W. hours to 9,060,200 K. W.

hours in a like period in 1921 and 1922 and to 10,124,624 K. W. hours in a like period in 1922 and 1923, and it has increased the amount taken at Greensboro from 8,754,200 K. W. hours in the twelve months immediately preceding the District Court's decree to 10,069,600 K. W. hours in a like period in 1921 and 1922 and to 11,475,700 K. W. hours in a like period in 1922 and 1923.

Respondent Public Service Company has already destroyed, by its own deliberate acts, the *status quo* which the courts below directed be continued by petitioner for respondents' benefit. The facts shown in the printed petition, respondent's construction of new lines to Jamestown, its extension of its industrial service at Greensboro, and the installation by it of three large transformers adjacent to petitioner's sub-station, show conclusively the intention of respondent progressively to increase the amounts of electricity it takes from petitioner and to alter the *status quo* more and more seriously in its own interest and to the prejudice of petitioner. The facts set forth in the petition show that if this continues it will be an irreparable injury to petitioner, effected by deliberate disregard of the decrees of the courts below on the part of respondent.

In addition, the facts set forth in the petition show that the taking by respondent Public Service Company of large amounts of electrical power in excess of the amount it is entitled to under the courts' decrees imminently endangers the petitioner's costly and valuable transformers and threatens to destroy them to the very great damage of petitioner and to the disruption of its service to the public.

The only means of protection possible to petitioner would be to cut off all power from respondent Public Service Company,

and this it cannot do without violating the courts' decrees. Petitioner is, therefore, wholly without remedy save at the hands of the court and unless the court grant to it the relief prayed in its motion.

3. *This application is in accordance with authority and precedent and this court has the power to maintain the status quo pending the determination of the suit, by restraining the respondent as prayed.*

We submit that this application is in accordance with the following statutory authority and precedents:

Rev. Statutes, section 716;

Ex Parte Milwaukee R. Co., 5 Wall. 188;

Omaha and Council Bluffs Street R. Co. v. Interstate Commerce Commission, 222 U. S. 582, 56 L. Ed. 324;

In re McKenzie, 180 U. S. 536, 549;

Cumberland Telephone & Telegraph Co. v. La. Public Service Commission (decided Nov. 22, 1922).

We further submit that the principles of equity, the statutory authority granted this court in Revised Statutes, section 716, and the authority of the cases above cited as precedents, should lead the court to preserve *pendente lite* the rights of the petitioner which otherwise will be irreparably destroyed, by entering its order restraining respondent Public Service Company in accordance with the prayer of your petitioner's motion.

This 25th day of September A. D. 1923.

W. P. BYNUM,

R. V. LINDABURY,

E. T. CANSLER,

W. S. O'B. ROBINSON, JR.

Attorneys for Petitioner, the Southern Power Company.

Office Supreme Court, U. S.

FILED

SEP 22 1923

WM. R. STANSBURY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1922.

No.  110

SOUTHERN POWER COMPANY,

Petitioner,

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF
GREENSBORO AND CITY OF HIGH POINT,

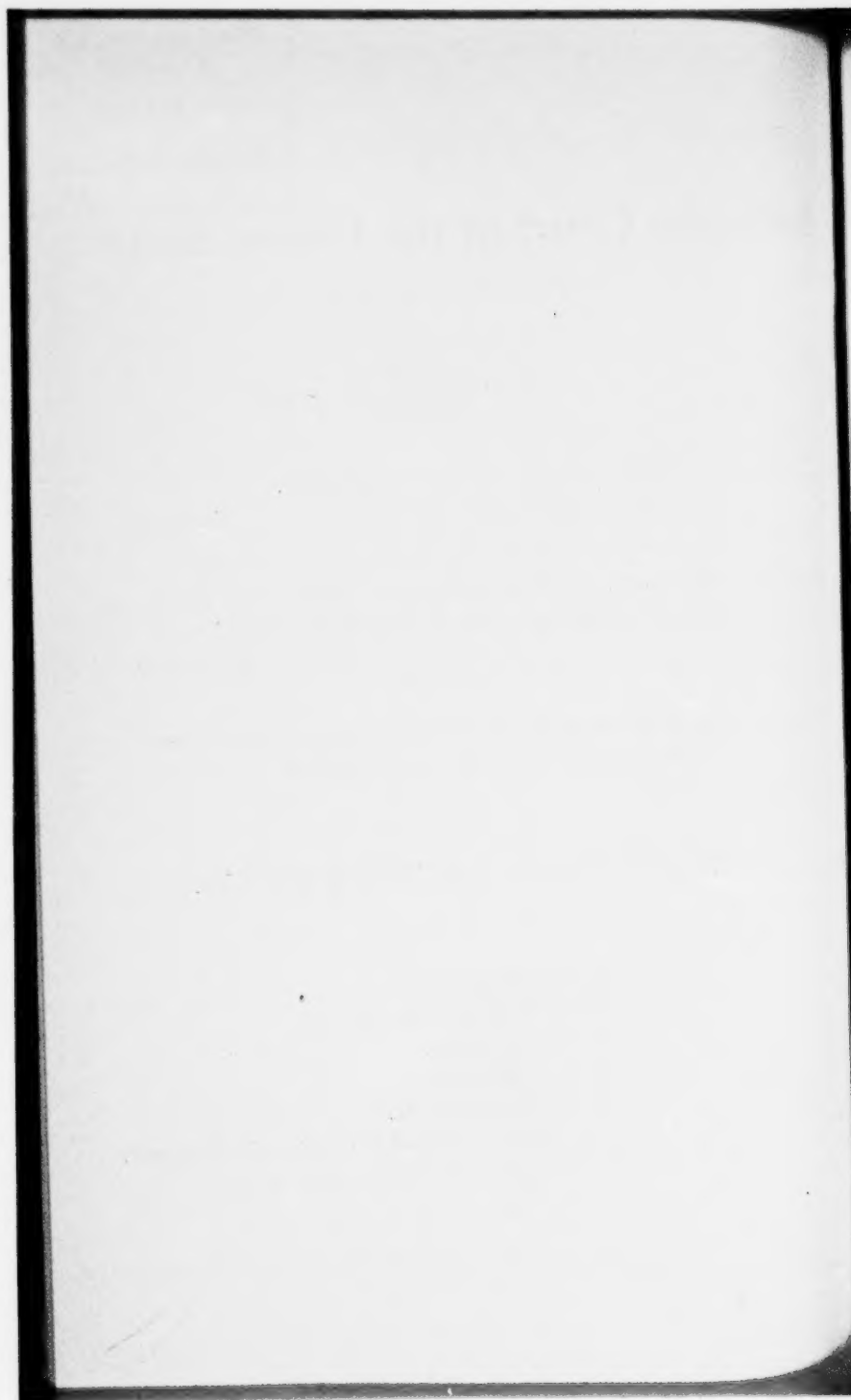
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

R. V. LINDABURY,
W. S. O'B. ROBINSON, JR.,
E. T. CAUSLER,
WM. P. BYNUM,
R. C. STRUDWICK,

Attorneys for and of Counsel with Petitioner,
SOUTHERN POWER COMPANY.



SUBJECT INDEX.

	PAGE
I. STATEMENT OF THE CASE.....	1
<i>a.</i> Abstract of the Complaint.....	2
<i>b.</i> Abstract of the Answer.....	3
<i>c.</i> Abstract of the Proofs	6
<i>d.</i> Judgment of the District Court.....	17
<i>e.</i> Judgment of the Circuit Court of Appeals.....	19
Prevailing Opinion	19
Dissenting Opinion	21
II. SPECIFICATIONS OF ERRORS RELIED ON.....	23
III. ARGUMENT:	
1. Petitioner not engaged in the business of selling and distributing electric current at wholesale....	25
<i>a.</i> Basis of Court's conclusion to the contrary	26
<i>b.</i> Error in Court's conclusion as to the facts	27
<i>c.</i> Competition of North Carolina Co. with petitioner	30
2. Petitioner has not dedicated its property to the manufacture and supply of electric current to other public utility companies for purposes of re-sale by them	31
<i>a.</i> Sale of current to municipalities not evi- dence of dedication	32
<i>b.</i> The special contracts with the predecessors of the North Carolina Co. disclosed no intent to dedicate.....	33

II

	PAGE
c. Neither do the four special contracts entered into with other public service corporations disclose such an intent.....	35
d. The situation as to the Southern Public Utilities Co.....	41
3. The allegation of monopoly in the ownership of all hydro-electric sites accessible to Greensboro and High Point is untrue in fact; and the allegation that petitioner actually operates all developed hydro-electric plants accessible and available to these cities is irrelevant in law.....	45
a. Petitioner has developed and is using only about 60,000 H. P. on the Catawba River in North Carolina, leaving about 1,095,000 H. P. on this and other rivers going to waste	45
b. The fact that petitioner operates all developed hydro-electric plants accessible to Greensboro and High Point is irrelevant, first, because the North Carolina Co. has both the power and opportunity to develop hydro-electric power for the supply of its customers if it chooses to exercise the same, and second, because such fact gives the North Carolina Co. no right to ingraft itself upon petitioner and constitute itself the distributing agency of the current developed by petitioner.....	45
4. The North Carolina Co., in its capacity as a vendor of electricity, is not one of the public to whom petitioner owes the duty of service under its charter and the laws of North Carolina.....	48

III

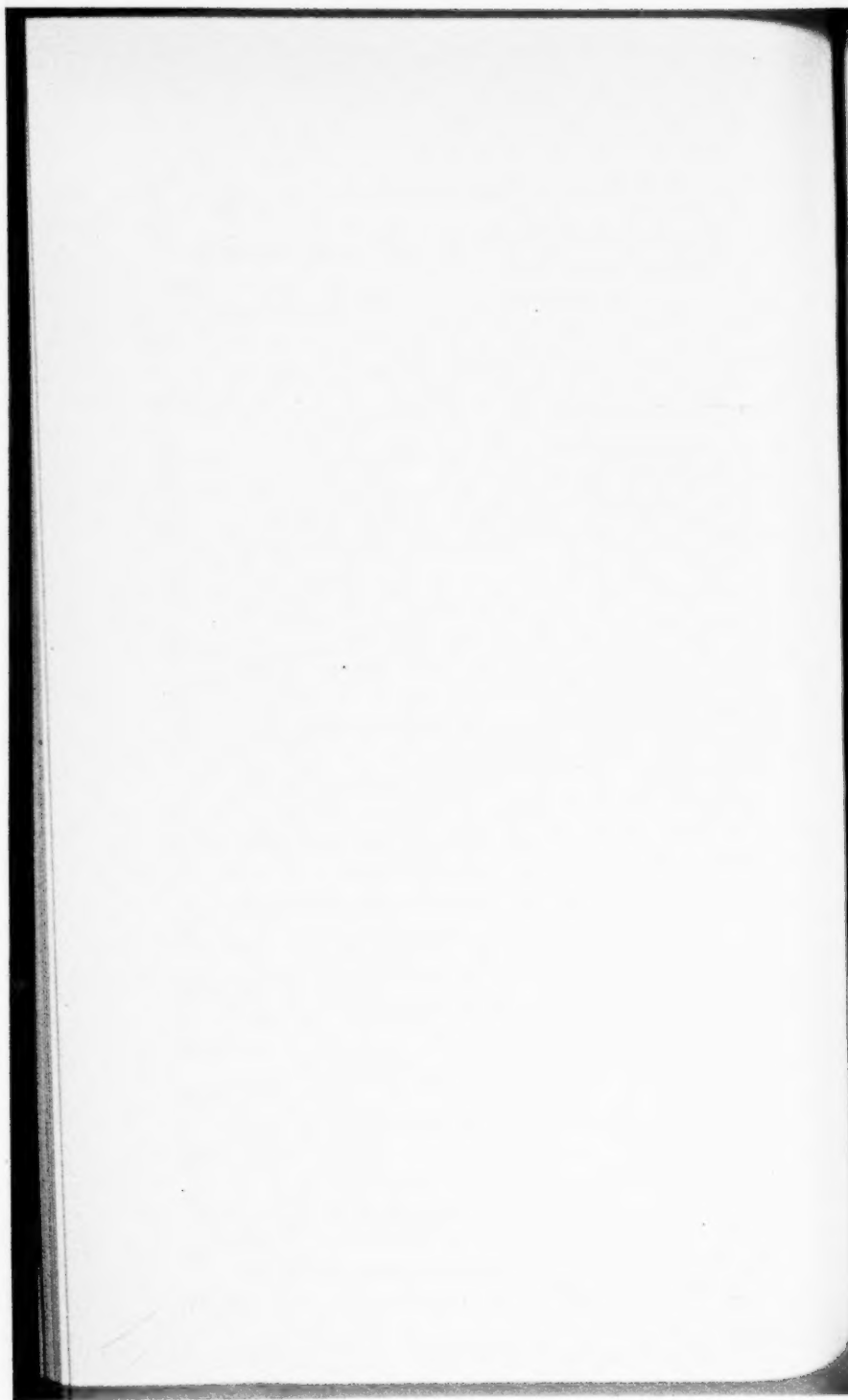
	PAGE
5. The fact that petitioner, as a public service corporation, is given the power of eminent domain by the laws of North Carolina, and has exercised such power in the transaction of its business, has no bearing on the issues in the case....	51
a. The conclusion of the Circuit Court of Appeals that petitioner has exercised the power of eminent domain for the purpose of transmitting current to independent vendors thereof is erroneous	51
b. The petitioner's transmission lines are its private property, although devoted primarily to the service of the public, and its use of such lines for distributing surplus current has not interfered with the service which it owes to the public	52
6. The decision of the Circuit Court of Appeals operates to deprive petitioner of its property without just compensation and without due process of law, deprives it of its freedom of contract, and denies to it the equal protection of the laws, contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States.....	54

IV

CASES CITED.

	PAGE
Anderson <i>ads.</i> Pacific Tel. & Tel. Co. (196 Fed. 699) . . .	50
Armstrong Cork Co. <i>ads.</i> City of Camden (210 Fed. 818)	31
Atchison, T. & S. Fe R. R. Co. <i>v.</i> Denver & New Orleans R. R. Co. (110 U. S. 667)	43, 55
Atlantic City <i>v.</i> Groff (68 N. J. L. 670)	31
Atlantic Express Co. <i>v.</i> Wilmington & W. R. Co. (111 N. C. 463, 16 S. E. 393)	38, 41
Camden, City of, <i>v.</i> Armstrong Cork Co. (210 Fed. 818) .	31
Central N. Y. Tel. & Tel. Co. <i>ads.</i> People, on relation of Oneida Tel. Co. (41 N. Y. App. Div. 17)	50
Central Stock Yards Co. <i>ads.</i> L. & N. R. R. Co. (212 U. S. 132)	50, 55
Central Stock Yards Co. <i>v.</i> L. & N. R. R. Co. (192 U. S. 568)	50
Chicago, &c., Ry. <i>v.</i> Minn., &c., Asso. (247 U. S. 490) . .	42
City of Atlantic City <i>v.</i> Groff (68 N. J. L. 670)	31
City of Camden <i>v.</i> Armstrong Cork Co. (210 Fed. 818) .	31
City of Springfield <i>ads.</i> Springfield Gas & Elec. Co. (257 U. S. 66)	32
Coburn <i>v.</i> San Mateo County (75 Fed. 520)	32
County of San Mateo <i>ads.</i> Coburn (75 Fed. 520)	32
Denver & New Orleans R. R. Co. <i>ads.</i> Atchison T. & S. Fe R. R. Co. (110 U. S. 667)	43, 55
Dixon <i>ads.</i> Irwin (9 How. 10)	32
Donovan <i>v.</i> Penna. Co. (199 U. S. 279)	37, 53
Evansville & H. Traction Co. <i>v.</i> Henderson Bridge Co. (134 Fed. 973)	48
Groff <i>ads.</i> Atlantic City (68 N. J. L. 670)	31
Henderson Bridge Co. <i>ads.</i> Evansville & H. Traction Co. (134 Fed. 973)	48
Home Telephone Co. <i>v.</i> Sarcoxie Light & Tel. Co. (139 S. W. 108)	49
Irwin <i>v.</i> Dixon (9 How. 10)	32
Little Rock & M. R. Co. <i>v.</i> St. Louis S. W. Ry. Co. (63 Fed. 775)	41

	PAGE
L. & N. R. R. Co. <i>ads.</i> Central Stock Yards Co. (192 U. S. 568).....	50
L. & N. R. R. Co. <i>v.</i> Central Stock Yards Co. (212 U. S. 132)	50, 55
Louisville & Nashville R. Co. <i>v.</i> West Coast Naval Stores Co. (198 U. S. 483).....	54
Memphis & Little Rock R. R. Co. <i>v.</i> Southern Express Co. (117 U. S. 1).....	38, 39, 42, 55
Minn., &c., Assoc., <i>ads.</i> Chicago, &c., Ry. (247 U. S. 490) ..	42
North Carolina Cons. Stat., Sec. 2832 <i>et seq.</i>	32
North Dakota <i>ads.</i> Northern P. R. Co. (236 U. S. 585) ..	54
Northern P. R. Co. <i>v.</i> North Dakota (236 U. S. 585)....	54
Northern Pac. R. Co. <i>ads.</i> Oregon Short Line & U. N. Ry. Co. (51 Fed. 465).....	41
Oneida Tel. Co. (People on relation of) <i>v.</i> Central N. Y. Tel. & Tel. Co. (41 N. Y. App. Div. 17).....	50
Oregon Short Line & U. N. Ry. Co. <i>v.</i> Northern Pacific R. Co. (51 Fed. 465).....	41
Pacific Tel. & Tel. Co. <i>v.</i> Anderson (196 Fed. 699).....	50
Penna. Co. <i>ads.</i> Donovan (199 U. S. 279).....	37, 53
People on relation of Oneida Tel. Co. <i>v.</i> Central N. Y. Tel. & Tel. Co. (41 N. Y. App. Div. 17).....	50
People's S. B. Co. <i>ads.</i> Weems S. B. Co. (214 U. S. 345) ..	54
San Mateo County <i>ads.</i> Coburn (75 Fed. 520).....	32
Sarcoxe Light & Tel. Co. <i>ads.</i> Home Telephone Co. (139 S. W. 108).....	49
Southern Express Co. <i>ads.</i> Memphis & Little Rock R. R. Co. (117 U. S. 1).....	38, 39, 42, 55
Springfield, City of, <i>ads.</i> Springfield Gas & Elec. Co. (257 U. S. 66).....	32
Springfield Gas & Elec. Co. <i>v.</i> City of Springfield (257 U. S. 66)	32
St. Louis S. W. Ry. Co. <i>ads.</i> Little Rock & M. R. Co. (63 Fed. 775).....	41
Weems S. B. Co. <i>v.</i> People's S. B. Co. (214 U. S. 345) ..	54
West Coast Naval Stores Co. <i>ads.</i> Louisville & Nashville R. Co. (198 U. S. 483).....	54
Wilmington & W. R. Co. <i>ads.</i> Atlantic Express Co. (111 N. C. 463, 16 S. E. 393).....	38, 41



Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 554.

SOUTHERN POWER COMPANY,
Petitioner,

vs.

NORTH CAROLINA PUBLIC SERVICE
COMPANY, CITY OF GREENSBORO
and CITY OF HIGH POINT,
Respondents.

On Writ of Cer-
tiorari to the
United States
Circuit Court of
Appeals for the
Fourth Circuit.

BRIEF FOR PETITIONER.

Statement of the Case.

This suit was instituted by the respondents against the petitioner in the Superior Court of Guilford County, North Carolina, September 2, 1920, and was shortly thereafter removed to the District Court of the United States for the Western District of North Carolina on the ground of diversity of citizenship. Defendant answered in the District Court and the case came on to be heard in that court in June, 1921. The hearing resulted in a decree in favor of the defendant on the

principal issue involved. From that part of the decree the plaintiffs appealed to the United States Circuit Court of Appeals for the Fourth Circuit and in May, 1922, secured a reversal of the same. Defendant thereupon applied for a re-hearing, and such application having been refused, petitioned this court for a writ of certiorari. The writ was allowed in December, 1922, and the case is now here on such writ and the return of the Circuit Court of Appeals thereto.

The Pleadings.

The gravamen of the complaint returned with the writ is that petitioner (defendant below) is a public service corporation engaged in the wholesale generation and distribution of electric current in the State of North Carolina; that in 1909 and 1910 it entered into contracts with the respondent, North Carolina Public Service Co. (hereinafter called the North Carolina Co.), in which it agreed to supply the latter, for the term of ten years, with all the necessary current and power which it might require to operate a street railway system owned by it in the Cities of Greensboro and High Point in the State of North Carolina, and for resale to said cities for municipal purposes and for supplying the inhabitants thereof with current for domestic use; that upon the expiration of said contracts petitioner refused to renew the same or to continue the supply of electric current to the North Carolina Co., claiming that it was under no duty to supply such cur-

rent for resale to said cities or the inhabitants thereof, notwithstanding it was then and for a long time had been, supplying other utility companies with current for resale and had thereby dedicated its property to that particular use.

The complaint further alleges that there is no other source from which respondents can purchase or obtain power and current for their several necessities and for the use of the inhabitants of said cities, and that petitioner already has and now enjoys a monopoly in the ownership of all available hydro-electric sites accessible to Greensboro and High Point. It prays that petitioner may be required to continue the supply of electric current to the North Carolina Co. for the operation of its street railway system and for resale by it to the cities of High Point and Greensboro and the inhabitants thereof.

Petitioner's answer admits that in November, 1908, it entered into a special contract with the High Point Electric Power Co. by which it agreed, for the term of ten years, to supply that company with current of a limited amount and under definite restrictions as to its use, and that in December of the same year it made a similar contract with the Greensboro Electric Company, both of which contracts were thereafter taken over by the North Carolina Co. It also admits that upon the expiration of said contracts it refused to renew the same or to continue furnishing current to the North Carolina Co. except for such period of time

as the latter might require to instal a generating plant of its own.

The answer asserts that petitioner is ready and willing to supply the cities of High Point and Greensboro and the inhabitants thereof with eletricity at current rates or at such rates as may be fixed by the Public Service Commission, but denies that it is under any obligation to supply such electricity through the medium of the North Carolina Co. and thus enable the latter to make a profit at the expense of petitioner or of said cities or their inhabitants.

The answer denies that petitioner is engaged in the distribution of electric current at wholesale or that it has dedicated its property to furnishing current to other utility corporations for resale. It admits that in a few instances petitioner has entered into special contracts with other public utility companies to sell them limited quantities of electricity at prices and for periods and upon terms and conditions stated in such special contracts, but asserts that the wholesale distribution of current is not and never has been any part of petitioner's business as a public service corporation, and that, except in the few instances referred to, petitioner has always sold and distributed and still sells and distributes its electric current and power directly to the users and consumers thereof.

The answer denies that petitioner has a monopoly in the ownership of available hydro-electric sites accessible to Greensboro and High Point and that there is no

other available source from which respondents can purchase or obtain power and current for their respective requirements and for the use of the inhabitants of said cities. It asserts that the North Carolina Co. has power under its charter and the laws of North Carolina to develop, construct, lease and operate, water power in that State or elsewhere and to manufacture, generate, distribute and sell electric current for public and private use, all as fully as petitioner may do under its charter and the laws of said State; that said company has frequently represented to petitioner that it proposed to build a hydro-electric plant with which to generate its own supply of electricity and on one occasion exhibited to the representatives of petitioner some of its plans for the construction of such hydro-electric plant, and that had said company used due diligence and shown a proper recognition of its contract obligations to the cities of High Point and Greensboro and the inhabitants thereof, it could have easily put itself in position to fully and adequately serve said cities and their inhabitants by January 1, 1921, the date to which, as matter of grace, petitioner extended the time during which it would supply said company with current.

For further defense the answer sets up:

1. That the North Carolina Co., being a public utility corporation and having power to generate its own electricity, cannot require petitioner to supply it with the same.

2. That the North Carolina Co. is engaged in the sale and distribution of electric current in competition with petitioner and is seeking to compel petitioner to deliver current for the purpose of selling and delivering the same in competition with petitioner to the injury and detriment of petitioner, its property and business.

3. That petitioner generates and acquires electric current for the purpose of selling and distributing the same to the users and consumers thereof in order to make a profit upon such sale and distribution; that if it is compelled to continue to sell and deliver electric current to the North Carolina Co. said company will resell and distribute the same to the users and consumers thereof in competition with petitioner and will deprive the latter of the profit incident to the sale and distribution thereof and will seriously injure and impair the property and business of petitioner and deprive it of the rights, privileges and franchises which it has under the law.

To this answer respondents filed a reply denying all matters and things set forth in the answer inconsistent with and contradictory of the matters and things alleged in the complaint.

The Proofs.

When the case came on to be heard before the District Court respondents moved for judgment upon the pleadings, and this motion having been overruled, sub-

mitted the case for final hearing upon the bill and answer (R., p. 323).

Petitioner thereupon, by leave of the court, introduced evidence in support of the affirmative defenses and counterclaims set up in its answer, calling as its first witness, Mr. W. S. Lee, its Vice President and Chief Engineer.

Mr. Lee testified that electricity, in almost every case, is sold by the Kilowatt; that a Killowatt is 1,000 Watts and is approximately $1\frac{1}{3}$ H. P. (R., p. 92); that during the twelve months ending April 30, 1921, petitioner sold in North Carolina 374,669,534 Kilowatts of electricity (R., p. 93); that in 1920 petitioner supplied the North Carolina Co. at High Point with 6,600,400 Kilowatts and at Greensboro with 8,270,600 Kilowatts (R., p. 94); that petitioner has made contracts with a few public utility companies in which it has agreed to furnish them power for their requirements under terms of contracts defining and fixing the different amounts; that petitioner does not sell power to other public utility companies except under such contracts (R., p. 94) and that said sales constitute a very small part of petitioner's business (R., p. 113).

Mr. Lee further testified that when petitioner undertakes to build a power plant, or add an additional power plant to its system, it estimates, as carefully as it can, just what output of power it will get from that station; that at the same time it undertakes to place contracts for that amount of power somewhere on its system; that

if it does not arrange for the sale of such power the plant will stand idle; that alternating current electricity cannot be stored and a customer must therefore be found to take it up as it is generated or there is an entire loss on that part of the investment which is not generating power (R., p. 93).

The special contracts referred to by the witness were enumerated by him on cross-examination at page 112 and were offered in evidence and constitute defendant's exhibits 37 (p. 255); 38 (Amended by Exhibit 41, pp. 261, 273); 39 (Amended by Exhibit 40, pp. 266, 272), and 42 (Amended by Exhibit 43, pp. 275, 282). The contracts with the predecessors of the North Carolina Co. were offered as defendant's exhibits 1 and 10 (pp. 148, 161). These latter contracts specifically provide that upon the expiration thereof petitioner may enter upon the premises of the consumers and take and carry away any meter, apparatus, appliances, fixtures or other property of petitioner (R., pp. 152, 166).

Mr. Lee further testified that he had negotiations with the representatives of the North Carolina Co. some time before the expiration of the contracts looking to a renewal of the same; that during these negotiations said representatives took the position that they could make their power cheaper by building a steam plant and discussed with him on two or three occasions the question of building such a plant somewhere between Salisbury and Greensboro and supplying all their plants therefrom; that this went on for a while and afterwards said

representatives stated that they would probably build a water power plant on the Yadkin River between Salisbury and Greensboro and transmit power to their plants from that point and that they exhibited to him plans and specifications for the proposed water power (R., pp. 95, 172).

Mr. Lee also testified that petitioner with its affiliated interests has two developments in North Carolina, one at Lookout Shoals of about 33,000 H. P. and one at Bridgewater of about 27,000 H. P., making a total of about 60,000 H. P.; that according to the geological survey and government reports there is undeveloped in the State of North Carolina about 1,095,000 H. P., an estimate which he thinks is low; that the Yadkin River lies between the territory served by North Carolina Public Service Co. and the Catawba River upon which the plants of petitioner are largely located; that the Yadkin River has approximately the same kind of fall as the Catawba and that just as much or more power can be developed on the Yadkin as on the Catawba (R., p. 97), and that petitioner owns no property on the Yadkin (R., p. 125).

Mr. Lee further said that the Roanoke River has two very fine power sites and is very much larger than either the Catawba or the Yadkin and that petitioner's transmission line from the Catawba to Greensboro and High Point is longer than would be required from the Roanoke River (R., p. 98).

He also testified that petitioner is engaged in selling

current for distribution to various municipalities in the State of North Carolina, naming Concord, Monroe, Mooresville, Shelby, Albermarle, Lexington, Newton, Statesville and Morganton (R., pp. 114, 118, 127), and said that petitioner does not retail current in the sense of supplying lighting customers in any incorporated town except Salisbury, North Carolina (R., p. 114); that petitioner sells current to approximately 300 cotton mills in North and South Carolina, about 75% of which are in North Carolina; that the current is sold to these mills for motive power and for lighting incident to the use of the motive power; that practically every cotton mill petitioner drives has its own mill village; that a great number of these mills light their villages from this power and that the contracts provide for the use of the current for that purpose (R., pp. 116-7). He said that most of the mills charge their employes nothing for lighting their houses and he thought none of them do (R., p. 125).

The witness said that the Southern Public Utilities Company was organized in 1913 and, although organized as a separate concern, is affiliated with petitioner (R., p. 121); that the stockholders of the Utilities Company are, to a large extent, stockholders of petitioner and that the general offices of the two companies are in the same building at Charlotte, North Carolina (R., p. 118); that prior to the organization of the Utilities Co. petitioner distributed power locally to some of the towns and had purchased from time to time some of the prop-

erties of other companies that were distributing current locally; that petitioner turned over to the Utilities Company upon its organization the property it had in the towns it was so serving and that since that time the Utilities Co. has distributed electricity locally in those towns, the current for that purpose being supplied by petitioner (R., pp. 121, 122, 110). (These towns are named on page 113 of the Record.)

Mr. Lee further testified that petitioner had not been able to sell any power since the Fall of 1919; that it had a sharp demand for power during the latter part of that year and made a great many contracts about that time; that it thereafter checked up its generation and sales and came to the conclusion that it was not safe to sell any more power and since that time has discontinued selling power to anyone except where perhaps some company had some unused power that it increased; that petitioner has on file applications for probably 25 or 30 thousand H. P. that it cannot make a contract for, and could not serve if it had them with the capacity of its present plant; that it has also 10 or 15 cotton mills whose contracts have expired and that petitioner is now carrying them on a temporary contract subject to cut-off when it has not got the power to run them (R., p. 99). He said that petitioner is in the situation today that it cannot make commitments and yet the North Carolina Co. is increasing its load faster than it ever has in its history and that the first time water goes down petitioner will have to cut off plants with which it has had contracts

that have expired in order to give the North Carolina Co. the power, if it stays on the line (R., p. 101).

Speaking on the subject of competition, Mr. Lee said that petitioner has some customers at High Point, instancing the Pickett Mills and Highland Mills; that it also has two or three rather large customers in the vicinity of Greensboro, naming the Proximity Mills, Revolution Mills and Pomona Mills; that it had an application for power at High Point from a concern named the Melton-Rhodes Company located at its sub-station there with just a fence between them; that petitioner was compelled to advise the Melton-Rhodes people that it could not supply them as it did not have the power, and that thereupon they made a contract with the North Carolina Co. and are now being supplied by that company (R., p. 123). Mr. Lee was then asked:

“Q. How does it happen that the N. C. Public Service Company can supply the Melton-Rhodes Company when the Southern Power Company cannot?

A. That is just what has got my entire company very much disturbed about the whole situation. We have a very peculiar phase of it right there. We have a certain amount of power to supply; we have no contract with the N. C. Public Service Co.; they are going on increasing their load faster than ever since we have been serving them. In the meantime we are forced to turn down applications for power from customers all over the system, and this particular point comes right square

back to the limit of High Point. We refused the Melton-Rhodes Company service and our substation is in a stone's throw of their plant. We have been driving the Pickett Mills, which is a few hundred yards the other side of the substation, and we have been forced to refuse our old customer service there, and they would be forced to shut down the Pickett Cotton Mills today if it was not for the depreciation in the cotton mill industry, and these strikes on, and it looks as if our contracts with our customers will have to be curtailed in order to take care of the contracts that the N. C. Public Service Co. is making right along. If that matter was carried on to a conclusion, I do not see where we can get the power and we would have to cut off some of our customers today if it was not for the fact that this curtailment is on.

Q. You have no contract with the N. C. Public Service Co.?

A. We have no contract with the N. C. Public Service Co. and their load is increasing very fast by selling power when we have positively forbidden anybody to sell elsewhere on the system. We cannot pull it.

Q. You will have to cut off your own contract customers?

A. If it stays on.

Q. Did you have application from the Southern Railway Co. to supply them power out at Pomona, some distance from the City limits of Greensboro?

A. Yes, sir.

Q. Were you able to fill that obligation?

A. No, sir; we told them that we did not have the power to supply it over our contracted power" (R., p. 123).

Mr. Lee also testified that at Salisbury both petitioner and the North Carolina Public Service Co. are distributing electric current locally, each having a franchise from the town for that purpose; that the Service Company obtains its current from petitioner; that the matter is in litigation (R., p. 115), and petitioner cannot get the Service Co. off its lines (R., p. 128).

Petitioner next called *G. C. Howard*, in charge of its substation at High Point. Mr. Howard testified that the North Carolina Co. is extending its lines beyond the city limits of High Point to factories in some places in the neighborhood of half a mile away. He named as such factories, Moffitt Underwear Co., Keystone Cabinet Co. and Perley A. Thompson Car Works. He also said the company is extending a line to Oak Hill school building and church about a half mile or more beyond High Point (R., pp. 136-7).

J. W. Matthews, petitioner's Division Superintendent at Greensboro, was also called as a witness. He testified that the North Carolina Co. has extended its lines beyond the limits of Greensboro to the Armour Company, the American Agricultural Chemical Co. and the Swift Company. These are all fertilizer companies. He testified that the North Carolina Public Service

Company also furnishes power to the Southern Railway at its Pomona yards $2\frac{1}{2}$ to 3 miles outside the city limits and that the company has also a lighting line which goes out on the battle ground road about three-quarters of a mile from the city limits; also a lighting line out on the Winston Road 4 or 5 miles (R., pp. 139-140).

Petitioner also offered in evidence certain letters received by it from the High Point Electric Co. in the Autumn of 1908 when the contract with that company was under negotiation. These letters deal with the subject of the dismantling of the electric company's steam plant referred to in Exhibit C annexed to the complaint (R., p. 17), and also with the period of time the contract was to run, the electric company at first insisting on 20 years, then on 15 years, and finally agreeing to 10 years. The letters are marked Defendant's Exhibits Nos. 2 to 9 (R., pp. 154-160).

Mr. Lee also testified on the subject of the dismantling of the electric company's steam plant. He said that petitioner did not desire it and that he had never intimated any such desire at any time; that the electric company was using a different kind of power from that generated by petitioner and that in order to use petitioner's power it was necessary for the electric company to dismantle its plant (R., pp. 91, 124).

Petitioner also read into the record an excerpt from a report made to the North Carolina Public Service Co. by its engineer at the time it was considering the build-

ing of a generating plant at High Rock on the Yadkin River. The excerpt is as follows:

"The contracts of the N. C. Public Service Co. are three in number and all expire about 1919. These contracts limit the maximum demand to 3,000 K. W. for Greensboro, 420 for Salisbury, and 1,200 K. W. for High Point. The contracts carry a rate of 1.1¢ per K. W. H. on all current purchased except a portion at 1.35¢ per K. W. at High Point. Under the conditions of these contracts the N. C. Public Service Co. is limited to obtaining of lighting and small power business. Except by special permission they are not allowed to serve large power consumers. On account of the probable electric railway extensions, and the fact that the N. C. Public Service Co. is reaching a point where its ability to take on new business will necessitate a new contract with the Southern Power Co. with a probable rate increase or an enlargement of the N. C. Public Service Co.'s own steam plant makes the High Rock development an interesting proposition, especially so if proper arrangements can be made with the Southern Power Co. to take the output above the requirements of the N. C. Public Service Co. until the Public Service Co. shall need the output" (R., p. 97).

Respondents called no witness in rebuttal. They did, however, offer certain exhibits which may be classified as follows:

1. Letters from representatives of petitioner to North Carolina Public Service Co. or its predecessor,

Greensboro Electric Co., bearing on the development of the electric distributing business at Greensboro (Plff.'s Exhibits A to K, R., pp. 290-295).

2. A prospectus issued by petitioner March 1, 1910, in support of an offer of its first mortgage gold bonds (Plff.'s Exhibit KK., R., p. 297).

3. Map of petitioner's transmission system (Plff.'s Exhibit L, R., p. 300).

4. Form of light and power contracts used by petitioner (Plff.'s Exhibits M and N, R., pp. 301-308).

5. Allegation 15 of complaint in *Salisbury and Spencer Ry. Co. and North Carolina Public Service Co. vs. Southern Power Co.*, and petitioner's answer thereto (Plff.'s Exhibit O, R., pp. 313-14).

Judgment of the District Court.

The District Court made specific findings of fact as follows:

1. "That defendant has never dedicated its property to the public use of selling electricity to other public utility companies for resale and distribution by such companies".

2. "That the North Carolina Public Service Co. by its charter, has the right to secure, develop and operate hydro-electric plants and to generate electricity and

sell and distribute it, and that the powers granted the North Carolina Public Service Co. in this respect are the same as those possessed by the Southern Power Co."

3. "That North Carolina Public Service Co. sells and distributes electricity that has been purchased from the defendant in competition with the defendant" (R., p. 318).

The Court thereupon ordered, adjudged and decreed:

"That the complainants have no legal right to require and compel the defendant to sell and deliver electricity to the complainant, North Carolina Public Service Company, for resale and distribution by said North Carolina Public Service Company to said Cities of Greensboro and High Point and their citizens and inhabitants and to the other customers of said North Carolina Public Service Company and that the complainants are not entitled to have the defendant enjoined from discontinuing the sale and delivery of electricity to said North Carolina Public Service Company for such uses and purposes" (R., p. 321).

The Court, however, decided that the North Carolina Co. is entitled to require petitioner to sell and deliver to it electricity for use by it as a motive power in operating its street railway systems in Greensboro and High Point and the vicinities thereof (R., p. 321).

Judgment of the Circuit Court of Appeals.

Majority Opinion.

Circuit Judge Woods filed an opinion (Judge Knapp concurring) in which he held:

That the Southern Power Company by its charter is authorized to buy, sell, operate or lease pole lines, erect poles, string wires thereon or on poles of other individuals or corporations * * * and to use the same either for the transmission of electric current, for delivery to consumers on such lines, or for transmission of current to independent vendors thereof, and to sell or lease to other individuals or corporations the right to string wires on or attach electric wires to any or all poles owned or leased, and to use such lines, both as through lines and for local delivery; that by the law of North Carolina hydro-electric companies are declared to be public service corporations subject to the laws of the State regulating public service corporations and under the control of the Corporation Commission of the State; that petitioner has exercised under State authority the power of eminent domain and has constructed about 1,500 miles of transmission lines and has developed about 60,000 H. P. of hydro-electric current; that exercising this right to carry its lines and power anywhere in the State by condemnation, petitioner has carried them to cities and towns and has made contracts with other public service corporations under its charter

power to use its property for "transmission of current to independent vendors thereof"; that among these independent vendors furnished with current is the Southern Public Utilities Company; that this company is nothing more than an offshoot of petitioner controlled by it and with the same stockholders; that while it is true that petitioner has been serving some towns and their inhabitants and factories in the same way that the North Carolina Public Service Company serves Greensboro and High Point and their inhabitants and factories, it appears by the testimony of Mr. Lee that in these instances it has turned over its property and contracts to Southern Public Utilities Company, which company purchases current from the parent company; that the evidence admits of no other inference than that the policy and aim of the petitioner is to furnish current directly to municipalities only through its own "independent vendor" Southern Public Utilities Company; that this leaves petitioner exercising its corporate power mainly if not entirely for the wholesale manufacture and sale of hydro-electric current; that while it is true that the North Carolina Co. does furnish current to contiguous factories and in this restricted sense may be a competitor of petitioner, it is not a competitor in the general manufacture, sale and distribution of current; that in the business of furnishing light and power to cities and towns and their inhabitants, the real competition of the North Carolina Co. and other independent vendors is not with petitioner exercising its corporate

powers but with Southern Public Utilities Company exercising its separate corporate powers; that while there is high authority for the general proposition of law that one competitor in business cannot demand service of another in promotion of its business, in this instance petitioner has definitely undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter, and for that purpose has exercised the power of eminent domain conferred by the State, and cannot now be heard to say that it owes no public duty with respect to that service, and that it may pick and choose its customers and arbitrarily discriminate among them (R., pp. 331-340).

Dissenting Opinion.

Judge Waddill filed a dissenting opinion in which he observed:

That the case presented is a simple one, viz., whether petitioner can be required, in the absence of a contract, to furnish appellant, North Carolina Public Service Company, a competitor, with power to enable the latter company to sell the same to the Cities of High Point and Greensboro and the citizens of said two cities, in competition with petitioner; that unless the contracts entered into with petitioner by the two companies acquired by the North Carolina Co., both of which have long since expired, or some other act on petitioner's part constitutes a dedication of its right to

sell electricity to the public, and thereby enables the North Carolina Co. and other similar companies to call upon it to furnish power for resale and distribution, in competition with itself, confessedly no such right exists; that, of course, appellee could have so conducted its business as to have dedicated its rights and privileges under its charter, to manufacture and furnish electricity to the public generally, in which event it would not be heard to decline to furnish the same to the North Carolina Co. as one of the public, for resale to the two cities involved here; but that if anything is manifest in this case, as well from the pleadings and proofs as from the findings of the lower court, it is that no such dedication has ever been made or was intended to be made; that on the contrary petitioner has at all times carefully in terms so contracted as to be relieved from the implication of any such folly as it would have been guilty of, had it transferred its vast business interests from its own stockholders for the benefit of the public; that the North Carolina Co. is not one of the general public, in the sense of a consumer; that on the contrary it is a competitor in business as a public service corporation, without the ability to produce electricity for sale, trying to ingraft itself on petitioner, with a view of securing its power, in order that it may deal in and resell the same in competition with the producer; that the equities of the case are clearly with petitioner; that the North Carolina Co. has all to make, and nothing to lose by the success

of the litigation since it is seeking to avail itself of the right to use petitioner's franchise in competition with it; whereas in the case of petitioner the situation is entirely different, in that it secured its charter to do business and is so engaged upon an extended scale, and at great expense, and is dependent upon having secured to it the rights given to it by its charter, to lawfully sell its output to its customers, without let or hindrance on the part of others who have no interest therein except to avail themselves of its rights and privileges and franchises (R., p. 340).

A decree was entered ordering that the decree of the District Court be modified as set forth in the majority opinion and that the cause be remanded to the District Court for further proceedings in accordance with such opinion (R., p. 344).

Specification of Errors Relied on.

Petitioner relies upon the errors specified in its petition for a writ of certiorari as follows:

1. That the Circuit Court of Appeals in effect held and decided that petitioner, a public service corporation, in the absence of a contract, owes to the respondent, North Carolina Public Service Co., a similar public service corporation, the duty of furnishing to it electric current manufactured and generated by petitioner, for resale and distribution to the public by such Service Co. at a profit to it, and in competition with

petitioner, in derogation of petitioner's right to distribute its own product to the public through its own instrumentalities or instrumentalities of its own selection (Pet., p. 12).

2. That the Court held erroneous the finding and judgment of the District Court to the effect that petitioner had never dedicated its property to the supplying of electric current to independent vendors, and found and adjudged, contrary to the evidence, that petitioner had in fact so dedicated its property (Pet., p. 13).

3. That the Court held and decided that respondent, North Carolina Public Service Co., in its capacity as an independent vendor of electricity, is a part of the public to whom petitioner owes the duty of public service in the exercise of its corporate powers (Sup. Br., pp. 24, 25).

4. That the Court held and decided that respondent, North Carolina Public Service Co., is not a competitor of petitioner in the sale and distribution of electricity within the meaning of the rule which exempts a public service corporation from the duty of serving a competitor in the promotion of such competitor's business (Sup. Br., pp. 25, 28).

5. That the Court held and decided that petitioner is shown by the facts appearing in the record to have

definitely undertaken and entered upon the particular service of furnishing electric current to independent vendors, and has thereby dedicated its property to the service of all independent vendors, including the North Carolina Public Service Co. (Sup. Br., pp. 25, 30).

6. That the decision of the Circuit Court of Appeals infringes the constitutional rights of petitioner in that it deprives petitioner of its property without due process of law and also deprives it of its freedom of contract, rights guaranteed to it by the Constitution of the United States (Pet., p. 13).

ARGUMENT.

POINT I.

Petitioner is not engaged in the business of selling and distributing electric current at wholesale. On the contrary, except to a very small extent, it sells and distributes its current direct to the consumers thereof, and in this respect its business and that of the North Carolina Public Service Co. are identical.

The decision of the Circuit Court of Appeals to the effect that petitioner is exercising its corporate powers mainly, if not entirely, for the wholesale manufacture and sale of hydro-electric current and is not, therefore, a competitor of the North Carolina Public Service Co. in the general sale and distribution of current is,

we submit, based upon a misapprehension of the pleadings and proofs.

Paragraph IV of the complaint alleges that petitioner is engaged in the wholesale distribution of current for profit (R., p. 3).

The answer denies this allegation and asserts that while in a few instances petitioner has made special contracts for what may be termed the "wholesale of power" in limited amounts and for limited periods upon the particular terms and conditions set forth in such contracts, the wholesale distribution of current is not and never has been any part of petitioner's business as a public service corporation, and that, except in the few instances referred to, petitioner has always sold and distributed, and still sells and distributes its electric current and power directly to the users and consumers thereof (Ans., par. IV, R., p. 27). No proof was offered by respondents in support of the allegations thus denied.

The Court, as a basis for its conclusion that petitioner is engaged in the wholesale distribution of current and is not in competition with the North Carolina Co., stated that while petitioner has been serving some towns and their inhabitants and factories in the same way that the North Carolina Co. serves Greensboro and High Point and their inhabitants and factories, it appears from the testimony of Mr. Lee that in these instances it has turned over its property and contracts to the Southern Public Utilities Co., which purchases its current from the parent company; that while it is

true that it bid in its own name for the contract to furnish current for the cities of Greensboro and High Point, it seems fair to infer that, in pursuance of its general policy, this contract would have been turned over to the Southern Public Utilities Co.; that at all events the evidence admits of no other inference than that the policy and aim of petitioner is to furnish current directly to municipalities only through its own "independent vendor", the Southern Public Utilities Co.; that this leaves petitioner exercising its corporate powers mainly, if not entirely, for the wholesale manufacture and sale of hydro-electric current; that it is true that the North Carolina Co. does furnish current to contiguous factories, and in that restricted sense may be a competitor of petitioner, but that it is not a competitor in the general manufacture, sale and distribution of current; that in the business of furnishing light and power to the cities and towns, and their inhabitants, the real competition of the North Carolina Co., and other "independent vendors", is not with petitioner exercising its corporate powers, but with Southern Public Utilities Co. exercising its separate corporate powers (R., p. 336).

How greatly the Court misapprehended the proofs on this point will appear from their simple recital. The Southern Public Utilities Co. was organized in 1913. It is not an "independent vendor" and has never been so characterized by petitioner. It is rather, as described in another part of the Court's opinion, an "offshoot" of petitioner, "controlled by it and with the same stock-

holders". Shortly after its organization petitioner turned over to it the business of distributing current locally in certain North Carolina towns which petitioner had therefore carried on, and that business has since been conducted by the Utilities Co. (R., p. 113). No contract appears to have been turned over by petitioner to the Utilities Co. since 1914. Neither does it appear that a single one of the contracts then turned over was for the delivery of current to a municipality for resale in whole or in part to its inhabitants, nor that the Utilities Co. has at any time taken on such a contract.

On the other hand, it appears that petitioner has made and still retains contracts with the towns of Concord, Monroe, Mooresville, Shelby, Albermarle, Lexington, Newton, Statesville and Morganton, under which it is supplying them with current for municipal use and for resale to their inhabitants (R., pp. 114, 118, 127); also that petitioner has contracts for furnishing electricity for power and light with over three hundred cotton mills (R., p. 116), besides contracts of the same character with certain railroads and other business enterprises; that the only current it is supplying at "wholesale" is furnished to three or four utility companies who are distributing it in the towns of Leaksville, Norwood, Hillsboro, and the territory served by the Piedmont Ry. & Elec. Co., and that this current is supplied under special contracts, offered in evidence as Deft. Ex. 37 (p. 255); 38 (p. 261); 41 (p. 273), and 42 (p. 275). It further appears that the total amount

of current sold by petitioner in North Carolina to municipalities for light and power, and to the Southern Public Utilities Co., the North Carolina Public Service Co., and all other public utility companies for resale to municipalities in this State, is approximately 17,000 horse-power out of over 300,000 horse-power generated, contracted and purchased by petitioner, and transmitted over its system. This latter statement is taken not from petitioner's proof but from paragraph VI of the complaint (R., p. 4).

It thus appears that if current were sold by petitioner at "wholesale" to all the agencies mentioned by the Court, which it is not, and if to these sales were added those made to municipalities, which are not mentioned by the Court, the total amount would be less than 6% of petitioner's sales in the State of North Carolina. Obviously, therefore, the conclusion of the Court that petitioner "is exercising its corporate powers mainly, if not entirely, for the wholesale manufacture and sale of hydro-electric power", is erroneous.

And it is equally obvious that the Court erred in its conclusion that in the business of furnishing light and power to cities and towns the real competition of the North Carolina Co. is not with petitioner but with the Southern Public Utilities Co. The activities of the North Carolina Co. are confined to the cities of Salisbury, Greensboro and High Point, and their vicinities. It does not appear that the Southern Public Utilities Co. has ever distributed a single kilowatt of electricity in any of these localities, but it does appear that petitioner

has distributing lines to each of them, and has for a long time been distributing current at retail therein.

In Salisbury petitioner has a franchise (Ex. 11, p. 167), and is supplying a portion of the inhabitants, and the North Carolina Co. is supplying the city and the remainder of the inhabitants, and it is doing this with current taken from petitioner's line (R., p. 115).

In April, 1920, petitioner applied to the city of Greensboro for a franchise to enable it to furnish current to the city and its inhabitants, and its application was defeated, apparently through the propaganda issued and circulated by the North Carolina Public Service Co. (Deft.'s Exs. 32, 33, 34 and 35, R., pp. 246-250).

Both petitioner and the North Carolina Co. are distributing current in considerable quantities in competition with each other throughout the territory surrounding Greensboro, Salisbury and High Point, and for the purposes of this competition the North Carolina Co. is taking current off petitioner's line (R., pp. 101, 123, 136, 137). The character of the competition so carried on is strikingly shown by an incident mentioned by Mr. Lee. He said that the Melton-Rhodes Co., which is located within a stone's throw of petitioner's substation at High Point, applied to it for power and was refused because petitioner could not spare it, and that thereupon the North Carolina Co. entered into a contract with the Melton-Rhodes Co. to supply it, and has since been doing so with current taken from petitioner's line (R., p. 123). He also said that petitioner was obliged to

refuse an application from the Southern Railway Co. to supply it with power out at Pomona, some distance from the city of Greensboro (R., p. 123), and Mr. Matthews testified that the North Carolina Co. is now serving the Southern Railway Co. at that point (R., p. 140). Mr. Lee further testified that the North Carolina Co. is increasing its load to such an extent that petitioner is forced to cut down some of its regular customers in the vicinity of Greensboro and High Point and elsewhere on its system (R., p. 123).

To say, therefore, that the North Carolina Co. is not in competition with petitioner in the general manufacture, sale and distribution of electric current and does not desire current from petitioner to sell in competition with it, is to totally misapprehend the testimony.

POINT II.

Petitioner has not dedicated its property to the manufacture and supply of electric current to other public utilities companies for purposes of re-sale by them.

Dedication is always a matter of intent, and "the facts and circumstances relied upon to prove the existence of an intent to dedicate on the part of the dedicator must be of a positive and unequivocal character." *Atlantic City v. Groff*, 68 N. J. L. 670, 672; *City of Camden v. Armstrong Cork Co.*, 210 Fed. 818, 820;

Irwin v. Dixon, 9 Howard 10, 30; *Coburn v. San Mateo County*, 75 Fed. 520.

Do the facts and circumstances proven in this case warrant the finding of an intent on the part of the petitioner to dedicate its property to the uses claimed by the respondents?

It is not claimed, as we understand, that petitioner's sale of electricity to municipalities, in part for public use and in part for re-sale to their inhabitants, shows such an intent. Manifestly it does not, as such municipalities are not on a plane with the public utilities companies in that they do not sell current at a profit, and their purchases of current for re-sale to their inhabitants is a part of their public functions. The distinction in this respect between a municipality and a public service corporation is pointed out in *Springfield Gas & Electric Co. v. City of Springfield*, 257 U. S. 66. Furthermore, under the laws of North Carolina, cities and towns have authority to operate municipal plants as well for the distribution of electric power and current to their inhabitants as for municipal use (Cons. Stats., N. C., Sec. 2832, *et seq.*). Petitioner, therefore, is under a duty to supply said cities and towns as a part of the consuming public. The majority opinion of the Circuit Court states that petitioner denies this obligation. This is an error. Petitioner has made no such denial, but admits its obligation in that respect, as shown by its application to the city of Greensboro for a franchise (R., pp. 8, 9), and by paragraph II of its second further answer to the complaint (R., p. 42).

Nor, we submit, can an intent to dedicate be inferred from the contracts entered into by petitioner with the predecessors of the North Carolina Co. These contracts will be found on pages 148 and 161 of the Record. They limit the quantity of current deliverable thereunder, the time the contracts are to run, the use to which the current may be applied, and specifically provide that on their termination petitioner may enter upon the property of the distributing company and remove its meters, apparatus, appliances, and other property therefrom.

That the High Point company at least did not understand that in making the contract with it petitioner was dedicating its property to the particular service in which that company was engaged, is apparent from the negotiations disclosed by the letters hereinbefore referred to. These letters show that the High Point company at first sought a contract for twenty years on the ground that it could not afford to change from its former system to petitioner's system for a shorter period; that it later came down to fifteen years, and finally accepted an agreement for ten years (R., pp. 154-161).

As to the contract with the Greensboro Co., this provides (Par. Eighth) that in consideration of the low rate at which power is to be delivered thereunder the Greensboro Co. will during the life of the contract keep its steam plant of 500 K. W. capacity at all times in readiness to be put in operation, and that the company will operate the same any afternoon between the

hours of four o'clock P. M. and seven o'clock P. M. upon notice from petitioner to furnish power either to itself or to petitioner, or that in case of accident or emergency it will put said steam plant in operation to supply its own demands or the demands of petitioner up to 500 K. W. capacity.

Further, the report of the North Carolina Co.'s engineer, heretofore referred to, furnishes potent evidence of the understanding of the North Carolina Co. that its rights against petitioner were of a contractual character and would terminate with the contract (R., p. 97).

It is true the complaint alleges that the cities of Greensboro and High Point, relying upon the North Carolina Co.'s right and ability to continue to obtain hydro-electric current from petitioner to be sold to its citizens desiring the same for light and power, heretofore entered into favorable contracts with the North Carolina Co. to purchase from it current for the lighting of their public streets, and other municipal purposes, and also granted to it franchises to occupy the streets of said cities, and invest the necessary capital in making and extending the desired accommodations for the growing demand of the people of both of said cities (Complt., Par. XXIX, R., p. 12).

The answer, however, denies that either the city of Greensboro or the city of High Point relied upon petitioner in granting its franchise to the North Carolina Co. or its predecessors, and points out that the franchise of each of said cities was granted to the prede-

cessors of the North Carolina Co. long before petitioner was chartered and came into existence. The answer further says that while, as defendant is informed, the city of High Point has recently entered into a contract with the North Carolina Co. for the wholesale purchase of power from said company to be retailed and distributed by the city, such contract was made after the North Carolina Co. had been notified by petitioner's letters of Jan. 8, 1920 (copies of which are annexed to the complaint), that petitioner would not, after Jan. 1, 1921, supply any electricity whatever to the North Carolina Co., and that it would be necessary for said company, within the period of twelve months stated in said letters, to equip itself to supply the needs and requirements of its own customers and of its business. The answer further points out that each of the contracts with the predecessors of the North Carolina Co. provides that all contracts made by them for the retailing of current shall be subject to said contracts with petitioner, and that the liability of petitioner for any purpose shall not be construed to extend to any other person or corporation than the vendee (Par. XXIX, R., p. 38).

It is needless to say that respondents offered no testimony in support of this allegation of their complaint.

Neither, we submit, do the contracts entered into with other public service corporations indicate an intent on the part of petitioner to dedicate its property to a service of the kind claimed by respondents. These

contracts are only four in number, as heretofore pointed out, and will be found on pages 255, 261, 266 and 275 of the Record. It will be found that they are along the same lines as those with the predecessors of the North Carolina Co. and as carefully limit the rights of the distributing companies thereunder and the periods within which such rights may be exercised. If petitioner had wished to negative any idea of an intent to dedicate its property to public use by these contracts, it is difficult to see how it could have done so more explicitly. Evidently the contracts, as well as those with the predecessors of the North Carolina Co., were entered into simply for the purpose of disposing of surplus current which otherwise would have gone to waste, and constituted no part of the current needed by petitioner to discharge its obligations to the consuming public (R., pp. 93-4). On the pages last referred to Mr. Lee points out that alternating current cannot be stored and that, unless a producing company can find someone on its system to take it, such company's investment suffers a loss. It is manifest that a producing company undertaking to supply the varying and growing needs of a community or series of communities must manufacture a surplus of current, or at least must maintain sufficient power for that purpose.

That a company so situate has a right to regard its surplus current as private property and to dispose of it by private contracts and does not by so doing incur additional obligations to the public and third persons,

is, we submit, shown by the decisions of this court in *Donovan v. Pennsylvania Company*, 199 U. S. 279.

In that case it was held that the Penna. Co. could legally grant to the Parmelee Transfer Co. the privilege of using its passenger station and depot grounds in the City of Chicago for the purpose of carrying on therefrom a transfer business for the accommodation of passengers arriving on its trains or on the trains of other railroads, and that such grant did not deprive it of the right to exclude from such station and grounds all hackmen or other expressmen coming to either for the purpose only of soliciting for themselves the custom or patronage of passengers.

The decision was put upon the ground that although the functions of a railroad company are public in their nature, such company holds the legal title to the property which it has undertaken to employ in the discharge of those functions; that, as an incident to ownership, it may use the property for the purpose of making a profit for itself, such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects; that it is required, under all of the circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers, *but that it is under no obligation to refrain from using its property to the best advantage of the public and of itself; that it is not bound to so use its property that others, having no*

business with it, may make a profit to themselves; that its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation.

Adverting to one of the contentions of the defendants, which has a similarity to the contentions made by the respondents in the present case, the Court said:

“Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that, as carriers of passengers, they are entitled to transact their business at any place which, under the authority of law, is devoted primarily to public uses—certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. *The railroad company was not bound to afford this particular privilege to the defendants simply because they had afforded a like privilege to the Parmelee Transfer Company, for it had no contractual relations with the defendants, and owed them, as hackmen, no duty to aid them in their special calling.*” (Italics ours.)

Further, we submit, the contracts in question must be considered in the light of the decision of this Court in the *Express Company* cases reported in 117 U. S., page 1, and the decision of the North Carolina Supreme Court in *Atlantic Express Co. v. Wilmington & W. R.*

Co., reported in 111 N. C. 463; 16 S. E. 393, both of which decisions preceded the making of the first contract.

In the *Express Company* cases the complainants had entered into contracts with the defendant railroad companies under which they were given the right to carry on an express business on defendants' roads. The contracts were terminable on notice by either party and the railroad companies gave such notice. Complainants thereupon brought suit to restrain the railroad companies from interfering with the exercise of the privileges they had theretofore enjoyed under their contracts. The grounds were, first, that the railroad companies, being common carriers, owed the duty of rendering such service to the complainants as part of the public; and, second, that the railroad companies by entering into the contracts with complainants, and similar contracts with other express companies, had established a usage in favor of the public which complainants were entitled to avail themselves of. Complainants prevailed in the court below and the case came before this Court on appeal. In reversing the decree this Court, after stating the case, said (p. 26):

"The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried,

just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freights are carried. * * *

"The constitutions and the laws of the States in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. * * *

"Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. * * *

"In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. * * *

"The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities

was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights."

In the *Atlantic Express Co.* case the Supreme Court of North Carolina accepted the decision of this Court in the *Express Company* cases as declaring the common law rule, and held that there was nothing in the statutes of North Carolina to the contrary, or which prevented the application of that rule to a similar situation arising there.

See also:

Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co., 51 Fed. 465;

Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co., 63 Fed. 775.

How, in view of these decisions, can it be affirmed that when petitioner entered into the special contracts in question, under the circumstances above set out, it intended to dedicate, or did in fact dedicate, its property and franchises to the use of every other public utility in North Carolina that might find it profitable or convenient to ingraft itself upon them?

This leaves for consideration only the situation with respect to the Southern Public Utilities Co. As already pointed out, this company is in no sense an "independent vendor". As the opinion of the Circuit Court states, it is an offshoot of petitioner, controlled by it and with the same stockholders. The business of petitioner is large and diversified, and the Utilities Co. was evidently organized simply for the purpose of conducting a branch of it in certain localities where, because of the amount of detail involved, it was inconvenient for petitioner to carry it on directly. The business so carried on by the Utilities Co. is as much the business of petitioner as if it were carried on by petitioner in its own name. Petitioner controls it, and petitioner, or its stockholders, receive the profits.

"In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transactions involved as if the corporate agency did not exist and as the justice of the case may require." *Chicago, &c., Ry. v. Minn., &c., Asso.*, 247 U. S. 490.

What law prohibits a public service corporation from carrying on a portion or branch of its business through a subsidiary or other agency of its choice, or imputes to it, by reason thereof, an intention to open up its business and turn over its property to every rival on the same terms? As this Court said in the *Express Cases*:

"So long as the public are served to their reasonable satisfaction, it is a matter of no import-

ance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public requires the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security" (117 U. S. 24).

In *Atchison, T. & S. Fe R. R. Co. v. Denver & New Orleans R. R. Co.*, 110 U. S. 667, it is said:

"At common law a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond that he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. * * * And if he holds himself out as a carrier beyond the line so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others than he would occupy if the means of transportation employed were all his own. *He certainly may select his own agencies and his own associates for doing his own work.*" (Italics ours.)

The organization and operation of the Utilities Co. would therefore seem to have no bearing on the question of dedication. Petitioner's sales to it are certainly not sales to an independent vendor.

The Circuit Court, however, apparently misapprehended the purposes and functions of this company and pictured it as an agency organized by petitioner and its stockholders for the purpose of distributing petitioner's current at retail in the State of North Carolina after petitioner had decided to abandon that branch of its business, and had definitely undertaken and entered upon the service of transmitting electric current to independent vendors thereof.

How unreal this picture is and upon what a mistaken view it is drawn, we have already pointed out.

This brings us back to the fundamental question of whether or not there was a dedication, and on this question we submit the proofs are all one way. As Judge Waddill well said:

"If anything is manifest in this case as well from the pleadings and proofs as from the findings of the lower court it is that no such dedication has ever been or was intended to be made. On the contrary, appellee has at all times carefully in terms so contracted as to be relieved from the implication of any such folly."

POINT III.

The allegation, in paragraph XXXIII of the complaint, that petitioner enjoys a monopoly in the ownership of all hydro-electric sites accessible to Greensboro and High Point, is untrue in fact; and the allegation that it actually operates all developed hydro-electric plants accessible and available to these cities is irrelevant in law.

The Government reports show that there is undeveloped water power in North Carolina of about 1,095,000 horse-power, which is of course going to waste. Against this, petitioner has developed and is using only about 60,000 horse-power in that State. Petitioner's developments are all on the Catawba River, which is farther away from Greensboro and High Point than either the Yadkin or the Roanoke—rivers of North Carolina from one of which as much, and from the other much more, power could be developed than from the Catawba (R., pp. 97, 98).

The North Carolina Co. has the same right under its charter and the laws of North Carolina to develop water power, and to engage in the generation and distribution of electricity, as is possessed by petitioner. If it is lacking in capital, or wanting in courage, to make use of its charter powers to that end, these circumstances do not give it the right to shout "monopoly" or to appropriate to itself the property and franchises of petitioner. A man may not reap where he has not sown.

The North Carolina Co. possesses the power of eminent domain, but it cannot exercise this power for the condemnation, either directly or indirectly, of the property of another corporation likewise engaged in the public service. "Where there is no change in the use, there cannot be a change in ownership under the law of eminent domain."

Nor, we submit, does the fear, if it exists, that the North Carolina Co., if it should build a generating plant of its own, would be unable to compete successfully in a field so largely pre-empted by petitioner—"rich in resources and experience"—constitute an "important factor", or any factor whatever, in determining whether it is entitled to the relief which it seeks in this case.

It is not suggested that this richness in experience and resources was obtained illegally, or that petitioner has placed any obstacles in the way of the North Carolina Co. acquiring like experience and resources. Furthermore, petitioner's rates are within the control of the Public Service Commission of North Carolina and could not be reduced for the purpose of driving a competitor out of business. There would, therefore, seem to be no basis for the "deterrent fear" alluded to by the Court except the risk that is involved in any enterprise requiring ability, courage and the use of capital.

We submit that the North Carolina Co. is not entitled to ingraft itself upon petitioner or to demand a share in the profits of petitioner's successful venture into what was at the time a new field simply because no one else has yet succeeded in this field and the North Carolina Co. is afraid to enter it.

If the North Carolina Co. can appropriate the property and franchises of petitioner in this way, so can every other utility company in the State, and as Judge Waddill pertinently asked, "How long could any business withstand such a strain?"

The North Carolina Co. has frequently declared to the representatives of petitioner that it proposes to build a generating plant of its own, alleging that it could thus obtain current more cheaply than petitioner was willing to sell it (R., p. 95).

In 1916 it exhibited plans for building a hydro-electric plant at High Rock on the Yadkin River which its engineers advised would furnish it with all the current it needed for its own use and the use of its customers, and a surplus besides (R., p. 96). Nothing, however, came of these declarations. Probably they were made for mere trading purposes. Be that as it may, the North Carolina Co. cannot first blow hot and then blow cold. Nor can it, on failing to drive a satisfactory bargain with petitioner, set up as a right what it has heretofore enjoyed as a privilege. This would savor too much of an attempt by a tenant to deny the title of his landlord. In this respect the action of the North Carolina Co. is identical with that of the complainants in the *Express Company* cases and, we submit, merits the same fate.

POINT IV.

The North Carolina Co., in its capacity as a vendor of electricity, is not one of the public to whom petitioner owes the duty of service under its charter and the laws of North Carolina.

It is true that petitioner's charter gives it the right to buy or lease pole lines, erect poles, string wires thereon, or on poles of other individuals or corporations, and to use the same for the transmission of electric current for delivery to consumers on such lines, or for transmission of current to independent vendors thereof. The charter also gives petitioner the right to permit other individuals or corporations to string wires, or attach electric wires to any or all the poles so erected, owned or leased, and many additional powers (R., p. 252).

All these powers are plainly permissible, and the grant of them imposes no obligation on petitioner to employ them against its will. Nor do the laws of North Carolina impose any such obligation. Undoubtedly these laws do require service to the public, and on equal terms, but they nowhere define as one of the public a rival desiring service for the promotion of a competitive business.

In *Evansville & H. Traction Co. v. Henderson Bridge Co.*, 134 Fed. 973, the Court said:

"While fully recognizing the well-known doctrine that public service corporations are bound to render to the public certain services appropriate to

the particular functions of the corporation, that doctrine has not been supposed to reach far enough to make the corporation serve the purpose or be subjected to the uses of a mere rival in business.

* * * * *

The rival is not, ordinarily, to be included in the term 'general public.' "

In *Home Telephone Co. v. Sarcoxie Light & Tel. Co.*, 139 S. W. 108, the Supreme Court of Missouri said:

"It must be borne in mind that, as to business coming from the Bell Company to the Sarcoxie Company, the Bell Company is in the attitude of an individual, with no less or more rights. The individual in the town can compel the Sarcoxie Company, upon tender of proper charges, to extend its service by phone to his place of business or residence. The corporation has done the same thing, but no more. The individual cannot build a line of his own and demand physical connection; neither can the corporation. If the Bell Company at Sarcoxie demanded of the local Sarcoxie Company that it place a 'phone in its place of business, such would be within the rights guaranteed by the statute. If it went to the Sarcoxie Company and tendered the proper fee, and said it wanted to talk over their line, such would be within the statute; but if it demanded that a physical connection be made between the two lines, so that its customers could talk over the lines of the Sarcoxie Company, that is an entirely different question. With its customers the Bell Company is doing in a way a private business. This private business it cannot foist upon a competing line, save and except as an individual could go to such competing line and demand

service, In other words, one telephone company, without the consent of the other, cannot take charge of and use the instrumentalities of such other company by compelling physical connection therewith. The statute in question never so contemplated."

In *People on relation of Oneida Tel Co. v. Central N. Y. Tel. & Tel. Co.*, 41 N. Y. App. Div. 17, the relator sought the right to connect its lines with those of the defendant company and relied upon the statute of New York prohibiting one telephone company from discriminating against another. In denying the relief sought the Court said:

"It is foreign to the purpose of the act to permit another corporation, under pretence of using the line of its rival for purely private business, to use it to absorb the very business and profit to which it was intended simply to permit it to contribute upon the same footing as an individual.

Assuming that it is the duty of the defendant company to render the like service to the relator as to an individual, it is plain that the relator here seeks by mandamus to compel the defendant to render much more than the like service,—it seeks an inequality of advantage under pretense of equality. The difference is not merely in degree, but in substance and result."

See also:

Pacific Tel. & Tel. Co. v. Anderson, 196 Fed. 699, 703;

Central Stock Yards Co. v. L. & N. R. R. Co., 192 U. S. 568;

L. & N. R. R. Co. v. Central Stock Yards Co., 212 U. S. 132.

POINT V.

The fact that petitioner, as a public service corporation, is given the power of eminent domain by the laws of North Carolina and has exercised such power in the transaction of its business, has no bearing on the issues in this case.

If the question were whether petitioner is a public service corporation and, as such, owes a duty to the public whom it has undertaken or is required by law to serve, the fact that it has obtained and is exercising the power of eminent domain would be of the first importance. But as petitioner admits this relationship and the resulting liability, and the question is simply whether the North Carolina Co. is one of the public to whom it owes the duty of service, the fact that it possesses and exercises the power of eminent domain is, we submit, of no account whatever.

We would suppose that this proposition is self-evident but for the repeated reference in the opinion of the Circuit Court to the obligation resulting from the petitioner's exercise of the power of eminent domain, and the implication at least that out of this arises the duty to serve all applicants, including those who wish current merely to sell again in competition with petitioner.

It is true the Court states that petitioner has exercised the power of eminent domain for the purpose of transmitting current to independent vendors thereof.

This, if correct, would be of account, but it is not correct. The evidence does not show that a single transmission line has been built by petitioner to any point or place for the purpose of supplying current to an independent vendor. The Court was apparently led into this error by supposing that the policy and aim of petitioner is to furnish current directly to manufacturers only through its own "independent vendor", the Southern Public Utilities Co., and that it is exercising its corporate powers mainly if not entirely for the wholesale manufacture and sale of hydro-electric current (R., p. 336).

If this supposition were well founded, the inference might be justified that petitioner has constructed and is using its transmission lines (assumed to have been constructed under its power of eminent domain) mainly if not entirely for the transmission of current to independent vendors thereof. That the supposition is not well founded we have already shown under Point I hereof, and the error into which the Court fell in this respect is fundamental and permeates and colors every part of its opinion.

Of course the current supplied by petitioner to the few independent vendors with which it has special contracts is transmitted to them over its own regular lines, but none of these lines appears to have been constructed for that particular purpose and all of them are used mainly, and most of them entirely, to supply the mills, factories, cities and other consumers to whom petitioner is furnishing current for light and power. These lines

are petitioner's private property although devoted primarily to the service of the public, and no law, we submit, prevents petitioner from using them to make a profit for itself so long as such use does not interfere with the public service (*Donovan v. Penna. Co., supra*).

To say that petitioner is exercising its power of eminent domain when it furnishes this particular service, and that therefore the service is public in character, although rendered under special contracts, is the same as to say that a railroad company is exercising its power of eminent domain when it makes a special contract with an express company for service on its line, and that therefore such service is public in character and must be rendered to all alike; or as to say that because a railroad company acquires its station and depot grounds by the exercise of its power of eminent domain it cannot make special contract with a transfer company for the use of such station and grounds without thereby obligating itself to extend similar privileges to all hackmen and expressmen who desire the privilege.

The power of eminent domain, we submit, was conferred by law upon petitioner for the benefit of the consuming public, not for the benefit of the North Carolina Co. and other companies engaged in a similar business.

POINT VI.

The decision of the Circuit Court of Appeals operates to deprive petitioner of its property without just compensation and without due process of law; deprives it of its freedom of contract and denies to it the equal protection of the laws, contrary to the fifth and fourteenth amendments of the constitution of the United States.

1. The decision by requiring petitioner, against its will, to sell its electricity to another public service company for resale and distribution by such company, compels petitioner to devote its property to a use to which it has not been dedicated, and thereby deprives it of its property without compensation and without due process of law.

Northern P. R. Co. v. North Dakota, 236 U. S. 585, 595;

Louisville & N. R. Co. v. West Coast Naval Stores Co., 198 U. S. 483, 495;

Weems S. B. Co. v. People's S. B. Co., 214 U. S. 345, 357.

2. The decision not only confers upon the North Carolina Co. the right to take petitioner's electricity against its will for the purpose of reselling and distributing it throughout a large part of the territory in which petitioner does business, to the exclusion of the petitioner's asserted right, itself, to sell and distribute

such electricity to the consumers thereof, but in its effect and results confers a similar right upon every other distributing company, now existing or hereafter created and thereby deprives petitioner of its property without due process of law.

L. & N. R. R. Co. v. Central Stock Yards Co.,
212 U. S. 132, 144.

3. The decision deprives petitioner of its right to distribute its electricity to the public through its own instrumentalities, or through instrumentalities of its own selection, and thereby deprives it of its property and of its freedom of contract without due process of law.

*Atchison T. & S. Fe. R. R. Co. v. Denver
& New Orleans R. R. Co.*, 110 U. S. 667,
680;

*Memphis & Little Rock R. R. Co. v. Southern
Express Company*, 117 U. S. 1.

POINT VII.

The decision of the Circuit Court of Appeals is erroneous both on the law and the facts and we respectfully submit that it should be reversed and the decision of the District Court affirmed.

Dated, September 24, 1923.

R. V. LINDABURY,
W. S. O'B. ROBINSON, JR.,
E. T. CAUSLER,
WM. P. BYNUM,
R. C. STRUDWICK,
Attorneys for and of Counsel
with Petitioner, Southern
Power Company.

FILED

NOV 5 1923

Supreme Court of the United States

WM. B. STANSBURY
CLERK

October Term, 1923.

No. 110.

SOUTHERN POWER COMPANY,
Petitioner,

against

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO AND CITY OF HIGH
POINT,

Respondents.

On Writ of Certiorari to the United States Circuit Court
of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS

AUBREY L. BROOKS,

JOHN W. DAVIS,

KING, SAPP & KING,

Attorneys for Respondent

North Carolina Public Service Company,

C. A. HINES,

Attorney for Respondent

City of Greensboro.

DRED PEACOCK,

Attorney for Respondent

City of High Point.



TOPICAL INDEX.

	PAGE
I. History of the case.....	I
1. Proceedings in the state courts of North Carolina	I
2. Proceedings in the Federal courts.....	2
II. Statement of facts.....	3
1. The Petitioner, the Southern Power Company, and its activities	3
2. The Respondent, the North Carolina Public Service Company, and its activities..	8
3. The Respondents, the cities of High Point and Greensboro	9
4. The business done in and about Greensboro and High Point by the petitioner and respondent, respectively	10
5. The controversy	11
6. The claim of the Southern Power Company	13
III. Argument	15
1. The Southern Power Company has dedicated its property to the business of selling electricity at wholesale to independent vendors for resale and distribution; it is therefore subject to the legal duty of serving such customers without discrimination and at reasonable rates.....	15
(1) The evidence supporting the fact of dedication	15
(2) The duty not to discriminate is mandatory	16
(a) The statutes of North Carolina	16
(b) The decisions of the Supreme Court of North Carolina	17

ii.

(c) Similar decisions in this and other courts	19
(3) The fact of dedication cannot be disguised nor the duty of equal service evaded by the device of special contracts	22
(a) The intent of the parties must be gathered from their entire course of conduct...	22
(b) A public service company cannot evade its duties by special contracts	23
(c) The Express Cases and other similar cases distinguished.	25
2. The claim that the North Carolina Public Service Company is a competitor of the Southern Power Company and as such not entitled to service is untrue in fact and without foundation in law.....	26
(1) There is no competition in fact between the two companies.....	26
(2) Even if there were some existing competition (which the respondents deny) that alone would not justify discrimination in rates and service	28
(3) There is no inconvenience, present or prospective, in the continued service of current to the North Carolina Public Service Company.	32
IV. Conclusion	35

TABLE OF CASES.

	PAGE
<i>Attica Water, Gas & Electric Co. v. Alden-Batavia Natural Gas Co.</i> , 3 P. S. C. (N. Y. 2nd district) 207..	20, 21
<i>Baker-Whiteley Coal Co. v. Baltimore & Ohio R. R.</i> , 188 Fed. 405	25
<i>Bare v. American Forwarding Co.</i> , 242 Ill. 298, 89 N. E. 1021	23
<i>Bell Telephone Co. v. Commonwealth</i> , 17 Phila. 405, 3 A. 825	20
<i>Central Elevator Company v. Moloney</i> , 174 Ill. 203, 51 N. E. 254	28
<i>Chesapeake & Potomac Tel. Co. v. Baltimore & Ohio Telephone Co.</i> , 66 Md. 399, 7 A. 809.....	20
<i>Chicago, Burlington & Quincy R. R. v. Iowa</i> , 94 U. S. 155	24
<i>Clarksburg Light and Heat Co. v. Public Service Commission</i> , 84 W. Va. 638, 100 S. E. 551.....	20, 23
<i>Delaware, etc. T. & T. Co. v. Delaware ex rel. Postal Telegraph Cable Co.</i> , 50 Fed. 677.....	20
<i>Donovan v. Pennsylvania Co.</i> , 199 U. S. 279.....	25
<i>East St. Louis Light and Power Company, Re.</i> (Ill.) P. U. R. Ann. 1919 E. p. 379.....	20
<i>Express Company cases</i> , 117 U. S. 1.....	25
<i>Great Western Power Co., Re.</i> (Cal.) P. U. R. Ann 1917 F. p. 569	20
<i>Lloyd v. Haugh Transfer Co.</i> , 223 Pa. 148, 72 A. 516..	23
<i>Los Angeles v. Los Angeles Gas & Electric Co.</i> , 251 U. S. 32.....	16
<i>Louisville & Nashville R. R. v. Mottley</i> , 219 U. S. 467	24
<i>Louisville & Nashville R. R. v. West Coast Naval Stores Co.</i> , 198 U. S. 483.....	25
<i>Mill Creek Coal & Coke Co. v. Public Service Com.</i> , 84 W. Va. 662, 100 S. E. 557.....	20
<i>Munn v. Illinois</i> , 94 U. S. 113.....	23
<i>New Orleans Gas Co. v. Louisiana Light Co.</i> , 115 U. S. 650	19
<i>New York and Queens Gas Co. v. McCall</i> , 245 U. S. 345	19
<i>North Carolina Public Service Co. v. Southern Power Company</i> , 180 N. C. 335, 104 S. E. 872.....	2, 17

<i>Perceval, People ex rel., v. Public Service Commission,</i> 148 N. Y. S. 583, 163 A. D. 705.....	20, 21, 23
<i>Postal Telegraph Cable Co. v. Associated Press,</i> 228 N. Y. 370, 127 N. E. 260.....	28, 29
<i>Postal Telegraph Cable Co. v. Cumberland T. & T. Co.,</i> 177 Fed. 726.....	28, 31
<i>Producers' Transportation Co. v. R. R. Commission,</i> 251 U. S. 228.....	24
<i>Salisbury & Spencer Ry. Co. v. Southern Power Co.,</i> 179 N. C. 18, 101 S. E. 593; 179 N. C. 330, 102 S. E. 625	17, 18, 19, 35
<i>State v. Butte City Water Co.,</i> 18 Mont. 199, 44 P. 966.	23
<i>State v. Cadwallader,</i> 172 Ind. 619, 87 N. E. 644.....	28, 30
<i>Taxicab Case,</i> 199 U. S. 279.....	25
<i>Terminal Taxicab Co. v. United States,</i> 241 U. S. 252..	23
<i>Union Dry Goods Co. v. Georgia Public Service Commis- sion,</i> 248 U. S. 372.....	24
<i>United States v. Union Pacific R. R.,</i> 226 U. S. 61.....	26
<i>United States Telephone Co. v. Central Union Telephone Co.,</i> 171 Fed. 130, 202 Fed. 66.....	20, 28, 30
<i>Van Dyke v. Geary,</i> 244 U. S. 39.....	23
<i>Western Union Telegraph Co. v. Commercial Cable Co.,</i> 177 Cal. 577, 171 P. 317.....	20
<i>Western Union Telegraph Co. v. Public Service Com- mission,</i> 230 N. Y. 95.....	20, 28, 29
<i>Wharf Case,</i> 198 U. S. 483.....	25
<i>Wood v. Consumers' Gas Co.,</i> 157 Ind. 345, 61 N. E. 674.	20

SYNOPSIS OF ARGUMENT.

I.

PAGE

THE SOUTHERN POWER COMPANY HAS DEDICATED ITS PROPERTY TO THE BUSINESS OF SELLING ELECTRICITY AT WHOLESALE TO INDEPENDENT VENDERS, SUCH AS THE PLAINTIFF, FOR RESALE AND DISTRIBUTION. IT IS THEREFORE SUBJECT TO THE LEGAL DUTY OF SERVING ITS CUSTOMERS WITHOUT DISCRIMINATION AND AT REASONABLE RATES	15
---	----

1.

The evidence overwhelmingly supports the fact of dedication	15
---	----

2.

The resultant duty not to discriminate is mandatory.	16
--	----

3.

The fact of dedication cannot be disguised nor the duty of equal service evaded by the device of special contracts	22
--	----

II.

THE CLAIM THAT THE NORTH CAROLINA PUBLIC SERVICE COMPANY IS A COMPETITOR OF THE SOUTHERN POWER COMPANY AND AS SUCH NOT ENTITLED TO SERVICE IS UNTRUE IN FACT AND WITHOUT FOUNDATION IN LAW..	26
--	----

I.

There is no existing competition between the two companies	26
--	----

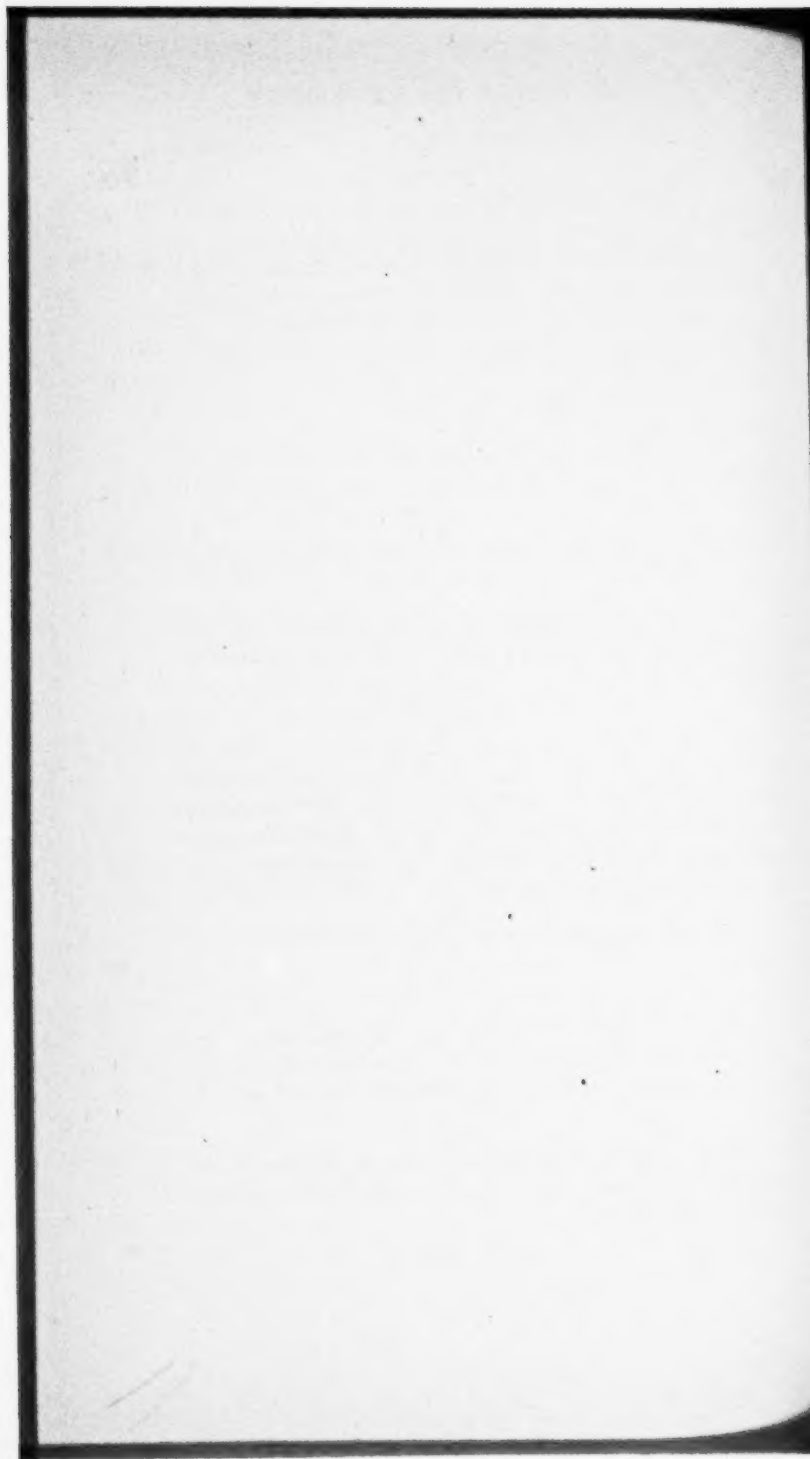
2.

Even if there were some existing competition between the two companies (which respondents deny) that alone would not justify discrimination in rates and service.	28
---	----

3.

There is no inconvenience present or prospective, in the continued service of current to the North Carolina Public Service Company	32
--	----

CONCLUSION.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

<div data-bbox="65 583 518 695" data-label="Text"><p>SOUTHERN POWER COMPANY, Petitioner, <i>against</i></p></div>	} No. 110.
<div data-bbox="40 714 523 862" data-label="Text"><p>NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO and CITY OF HIGH POINT, Respondents.</p></div>	

On Writ of Certiorari to the United States Circuit Court
of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS.

History of the Case.

This is a proceeding in mandamus brought in accordance with the Statutes of the State of North Carolina to compel the Southern Power Company, petitioner herein, defendant below, to continue to supply the North Carolina Public Service Company, respondent herein, plaintiff below, with electric current and power for use and resale in the cities of Greensboro and High Point, North Carolina. The action was begun by the filing of a complaint in the Superior Court

of Guilford County, North Carolina, on September 2, 1920. The Southern Power Company appeared and petitioned for the removal of the case to the United States District Court for the Western District of North Carolina on the ground of diversity of citizenship. The State Court declined to grant this motion, and on appeal by the defendant to the Supreme Court of North Carolina that Court (180 N. C. 335) affirmed the ruling of the Court below, holding that under the allegations of the complaint "a writ of mandamus may properly issue" and that a proceeding in mandamus is not of a removable character. Thereupon the defendant filed its answer in the Superior Court of Guilford County and the case coming on to be heard in that Court, final judgment was rendered on December 14, 1920, granting the relief prayed for in the complaint, and directing the defendant to continue to furnish current. From this judgment the defendant appealed to the Supreme Court of North Carolina.

Meanwhile, on September 15, 1920, the defendant, in pursuance of its purpose to remove, filed a transcript of the record in the United States District Court for the Western District of North Carolina, and on the 23rd day of October, 1920, filed its answer therein. The motion by the plaintiffs to remand was denied on the ground that the case was one for injunction rather than mandamus, and the District Court, on motion of the defendant, enjoined further proceedings in the State Court. On June 16, 1921, the case came on to be heard in the District Court. The plaintiffs, content with the situation presented by the complaint and answer, offered to submit upon the pleadings. Witnesses, however, were introduced by the defendant and, after hearing, the District Court decreed (R. 317) that the Southern Power Company should not be required to furnish current to the plaintiff company for resale to the cities of Greensboro and High Point or to other customers, but that it must furnish current to the plaintiff for motive

power in operating its street railway system in the two cities in question; and further prosecution of the pending or of any other suits in the Superior Court of Guilford County or elsewhere was enjoined.

From so much of this decree as relieved the Southern Power Company from the requirement to furnish current to the North Carolina Public Service Company for resale the plaintiffs appealed to the United States Circuit Court of Appeals for the Fourth Circuit, which Court on May 11, 1922, reversed the decree of the Court below in this regard (R. 331, 344; 282 Fed. 837). A rehearing having been denied, the defendant has brought the case to this Court by petition for a writ of certiorari.

Statement of Facts.

The essential facts of the case lie within a comparatively brief compass, and in the main are not in dispute.

I.

The petitioner, Southern Power Company, defendant below, is a corporation under the laws of the State of New Jersey. Among other powers expressed in its charter are (R. 251)

“to develop, control, generally deal in and dispose of to such person or persons, corporation or corporations, and for such price or prices and on such terms and conditions as to the corporation may seem proper, electrical and other power for the generation, distribution and supply of electricity for light, heat and power and for any other uses and purposes to which the same are adapted.”

and also (R. 252),

“to * * * buy, sell, operate or lease pole lines * * * and to use the same either for the transmission

of electric current for delivery to consumers on such lines, or *for transmission of current to independent vendors thereof.*"

It voluntarily domesticated itself in the State of North Carolina, and thus brought itself within the purview of the statutes of that State which declare (Consolidated Stats. of N. C. Ch. 21, Art. 2) that

"All water power, hydro-electric power and water companies now doing business in this State, * * * * whether organized under the general or private laws of this State or under the laws of any other state or country, * * * * are deemed to be public service companies and subject to the laws of this State regulating public service corporations."

In pursuance of its charter powers, it has constructed about 1,500 miles of transmission lines (exercising in doing so the right of eminent domain) and had a generating capacity at the time of suit of about 300,000 horse power. In addition to the current which it develops itself, it purchases current from other large producers with which it is connected, such as the Carolina Light & Power Company, the Georgia Railway & Light Company, the latter of which connects in turn with the Central Georgia Power Company and the Columbia Power Company (R. 114, 115; map R. 300). Together with its connecting companies it owns and controls all the hydro-electric power now generated and available in this entire region (R. 118, 119).

Although permitted by its charter to engage in the sale of electric current, either at retail or at wholesale, it deliberately chose to engage by preference in the wholesale business. Thus in offering its bonds for public subscription in 1915, it described its business as follows (R. 299):

"The Company supplies power to more than 170 mills which operate approximately 3,274,000

spindles, and 71,000 looms. It also *sells at wholesale* electricity for commercial and municipal uses to the *local distributing companies.*"

while the defendant's Vice-President testified (R. 114),

"We do not retail current in the sense of supplying lighting customers in any incorporated town in North and South Carolina except Salisbury."

How general was its practice of wholesaling current to independent venders for resale to the ultimate consumer appears from the following list of towns in which it is so engaged under contract with the independent vender or distributor in each locality:

TABULATION BY TOWNS IN NORTH AND SOUTH CAROLINA
OF VENDER-CUSTOMERS OF SOUTHERN POWER COMPANY

<i>Town</i>	<i>Independent Vender</i>	<i>Page of Record</i>
Leaksville (Spray), N. C.	Leaksville Light & Power Co..	112, 255
Reidsville, N. C.	Southern Public Utilities Co..	104, 113
Greensboro, N. C.	N. C. Public Service Co.....	91, 161
Burlington, N. C.	Piedmont Ry. & Electric Co..	112, 275, 282
Hillsboro, N. C.	Hillsboro Light & Power Co..	112, 266, 272
High Point, N. C.	N. C. Public Service Co.....	90, 148
Winston-Salem, N. C.	Southern Public Utilities Co..	113
Lexington, N. C.	Municipality	127
China Grove, N. C.	Southern Public Utilities Co..	113
Mooresville, N. C.	Municipality	114
Hickory, N. C.	Southern Public Utilities Co..	118
Newton, N. C.	Municipality	127, 181
Statesville, N. C.	"	118
Morganton, N. C.	"	118
Mt. Holly, N. C.	Southern Public Utilities Co..	113
Belmont, N. C.	" " " " ..	113
Shelby, N. C.	Municipality	118, 181
Lincolnton, N. C.	"	147, 181
Concord, N. C.	"	110, 114, 131
Charlotte, N. C.	Southern Public Utilities Co..	113
Albemarle, N. C.	Municipality	127
Norwood, N. C.	Norwood Light & Power Co..	112, 261, 273
Monroe, N. C.	Municipality	114
Lancaster, S. C.	Lancaster Light & Power Co..	113
Chester, S. C.	Southern Public Utilities Co..	113
Greer, S. C. [Green].....	" " " " ..	113
Greenville, S. C.	" " " " ..	113

This table, culled from the testimony, is not claimed by the petitioner's witness Lee (R. 112, 113) to be exhaustive. In view of the situation as shown by the map (R. 300) it is clearly not so. In addition the Southern Power Company sells electricity at wholesale to at least 300 cotton mill companies (R. 116), many of whom in turn retail it for lighting purposes in their mill towns.

The Southern Public Utilities Company, a Maine corporation, mentioned as one of the "independent venders" in the foregoing list, is stated by the Circuit Court of Appeals in its opinion to be "nothing more than an off-shoot of the Southern Power Company, controlled by it, and with the same stockholders" (R. 335), while the petitioner says in its brief (p. 42):

"The business so carried on by the Utilities Co. is as much the business of petitioner as if it were carried on by petitioner in its own name. The petitioner controls it and the petitioner or its stockholders receive the profits."

Both statements go beyond the evidence. The complaint avers (R. 7) and the answer admits (R. 33) that J. B. Duke—not the Southern Power Company—is the principal owner of the stock of the Southern Public Utilities Company, but the witness Lee (R. 104) testified concerning Mr. Duke:

"I do not think he has [a] very large holding now but he has had considerable interest."

That stockholdings are not identical in the two companies appears from his testimony (R. 118) to the effect:

"The stockholders of the Southern Public Utilities Company are *to a large extent* stockholders in the Southern Power Company."

Although the Southern Public Utilities Company is loosely spoken of throughout the Record as an "affiliate" or "subsidiary" of the Southern Power Company,

it was "organized as a separate company" (R. 121) and the Southern Power Company is not the owner of its stock. The relation in law between the two companies is that of corporate strangers.

The contracts between the Southern Power Company and the independent venders were in the main on standardized printed forms prepared for that purpose (R. 130) with such differences in rates, conditions of delivery and other conditions as the Southern Power Company was able to negotiate during the period when it thought itself free from any form of regulatory control. Its contract (or contracts) with the Southern Public Utilities Company running until 1944 is not introduced in evidence, and it is asserted that it has never been executed by the Southern Power Company (R. 104).

The contracts in evidence, however, suffice to show beyond dispute the character of the business in which the Southern Power Company is engaged. Thus its standard printed form for municipalities and other public utilities companies (R. 308; witness Lee, R. 130) recites (first clause) that the Power Company will sell and deliver current "for use by the consumer and sale to its customers in and around ———;" that with the Leaksville Light & Power Company (R. 257) "for lighting streets and public and private buildings and for furnishing electric lights or electricity for lighting, heating and motive power to the inhabitants of the town of Leaksville and the vicinity thereof, and for other municipal purposes"; the same language appears in the contracts with the Norwood Light & Power Company (R. 263) and the Hillsboro Power & Lighting Company (R. 268), while the Piedmont Ry. & Electric Co. buys its current (R. 278) "for the purpose of its being used for the operation of its own plant or for resale to others."

In the states both of North and of South Carolina, the Southern Power Company has vigorously resisted the right of the states to regulate its rates and charges; but in 1920, following litigation between these same par-

ties concerning service in the City of Salisbury, the Power Company experienced a change of heart and filed a petition with the Corporation Commission of the State of North Carolina for a revision of its rates (R. 108, 109). Said the witness Lee (R. 110) with reference to this petition:

“Q. You asked that the rates in all your outstanding contracts, some of them with six and eight years to run, both with cotton mills and municipalities and other public service companies—that the rate be abrogated and the Commission fix a higher rate?

A. I do not know that we asked for that, but I have been advised that there can only be one just and equitable rate for this purpose. We asked the Commission to fix that rate.”

In view of all this, it is late in the day for the petitioner to contend that it has not dedicated its property to the manufacture and supply of electric current to other utilities companies for purposes of resale by them.

II.

The respondent, North Carolina Public Service Company, plaintiff below, is a corporation under the laws of the State of North Carolina. It was incorporated in the year 1909 as the successor of the Greensboro Electric Company, the High Point Electric Power Company and the Salisbury & Spencer Railroad Company. Its business consists of the operation and management of the street car systems in the cities of Greensboro and High Point, and of the control and operation of the electric light and power systems in both cities under franchises granted to it for that purpose. Through this system it furnishes under contract with the cities (High Point, R. 192, 196, 200, 202; Greensboro, R. 243) current for the lighting of their streets, public buildings,

parks, etc., and also sells and distributes current for light and power to the inhabitants of the same. While it is authorized by its charter to build and operate water powers for the production of electric current for sale throughout the State, it has never done so but has confined its activities to the cities of Greensboro and High Point.

It is also engaged in a somewhat similar business in the city of Salisbury, which has been the subject of litigation between itself and the Southern Power Company in the North Carolina courts; but the situation at Salisbury is not involved in this suit.

The North Carolina Public Service Company owns no generating plants with the exception of one small steam plant, now obsolete, at Greensboro, and it does not connect nor can it connect with any of the distributing companies other than the Southern Power Company (R. 114, 300). Some years ago the plaintiff's predecessor in interest, the High Point Electric Power Company, owned and operated a small steam plant at High Point, but under the terms of its contract with the Southern Power Company hereinafter mentioned, it was stipulated that this steam plant should be dismantled, which was accordingly done (R. 90, 149). Since the making of the contracts hereinafter described, the North Carolina Public Service Company has relied and has been led to rely solely upon the electric current which the Southern Power Company is engaged in distributing to it and to other independent venders throughout the State.

III.

The respondents, City of High Point and City of Greensboro, are municipal corporations under the laws of North Carolina. As such they are empowered by statute (Cons. Stats. of N. C., Secs. 2832, *et seq.*) to establish and operate electric generating systems for the distribution of electric power and current to their

inhabitants as well as for their municipal use. Instead of so doing, however, they have deemed it expedient to grant franchises for the purpose in each city to the North Carolina Public Service Company, and to contract with it (R. 192, 196, 200, 202, 243) for the lighting of their streets and the service of current to the municipalities and their inhabitants. They are content with this arrangement and wish it to continue.

IV.

The Southern Power Company has no franchise enabling it to do business in the cities either of Greensboro or High Point. Its application to the City of Greensboro for such a franchise in April, 1920, was rejected by the decisive popular vote of 990 to 78 (R. 242). The statement in petitioner's brief (p. 30) that it "has for a long time been distributing current at retail" in each of said cities is a patent inadvertence.

The only customers of the Southern Power Company at the City of High Point are the North Carolina Public Service Company, and the Pickett Mills and Highland Mills, which lie without the city. The Milton Rhodes Company, whose application was refused by the Southern Power Company and accepted by the North Carolina Public Service Company (Petitioner's Brief, pp. 12, 30), is situated inside the corporate limits and therefore within the area which the Southern Power Company has no franchise rights to serve. Its situation was the same as that of the High Point Silk Mill, as to which the General Manager of the Southern Power Company wrote (R. 294):

"His mill being located within the city limits of High Point, we did not feel at liberty to enter into any negotiations with him at all."

At Greensboro, the Southern Power Company serves only the North Carolina Public Service Company, and

the Proximity and Revolution mills, which lie without the corporate limits.

The terms of the contracts, shortly to be mentioned, made by the Southern Power Company with the predecessor companies of the North Carolina Public Service Company provide for the sale of its current not only inside the cities of Greensboro and High Point, but to "the inhabitants in the vicinity thereof." Accordingly, the North Carolina Public Service Company has with the consent of the petitioner, expressed in some instances (R. 126, 291, 293, 295), and implied under the terms of the contract in others, extended its lines to certain industries in the outskirts of Greensboro and High Point. There is no evidence that the Southern Power Company objected to any of these extensions, and specific proof of their consent to most of them. The Southern Power Company has no lines to any of the concerns so served, nor has it made any effort on its part to furnish them with current (R. 126, 140).

V.

In the year 1908 the Southern Power Company entered into contracts (R. 148, 161) with the Greensboro Electric Company and the High Point Electric Company, predecessors in interest of the North Carolina Public Service Company, to furnish current to be (R. 149, 162, fourth clause)

"sold or used in lighting the streets of said city and the public and private buildings therein, and for furnishing electric light or electricity for lighting, heating and motive power to said city and its inhabitants and the inhabitants in the vicinity thereof."

In order to make the position of the Southern Power Company clear beyond dispute, these contracts further provided that (R. 150, 163)

“It is expressly understood and agreed that said Power Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for, and that said Power Company shall not be in any way responsible for the transmission or control of said electric power or current beyond such point of its delivery to said consumer.”

At the expiration of these contracts which ran for ten years, the North Carolina Public Service Company, which had succeeded to all rights thereunder, undertook to obtain a renewal of the same, but the Southern Power Company insisted upon a new rate, higher than that which it was charging for the same service to the Southern Public Utilities Company and other similarly situated independent venders (R. 111). The North Carolina Public Service Company protested, but finally agreed to sign a contract at the higher rate, provided it contained a stipulation to the effect that (R. 111)

“It is understood that the scale of rates herein stipulated is made subject to any ruling of the Court or corporation commission affecting rates.”

To this provision the Southern Power Company refused to consent, and broke off the negotiations with letters (R. 15, 16) refusing to furnish a regular supply on any terms and withdrawing all offers to contract for power. Confronted with this definite and final refusal, the North Carolina Public Service Company brought its proceeding in mandamus under the statutes of North Carolina in such case made and provided (Secs. 866-7, Cons. Stat. of No. Car.) to compel the performance by the Southern Power Company of the duties it had assumed.

VI.

While the respondent in its letters of refusal dated January 8, 1920 (R. 15, 16) refers by way of excuse to the existing demands upon its supply, it is significant that on April 26, 1920, when seeking a franchise from the City of Greensboro, it stated (R. 237) that it would furnish

“your city and its citizens whatever electricity shall be needed for municipal and domestic consumption,”

while Vice-President Lee stated upon the witness stand that his Company was ready, able and willing to sell and deliver electricity to Greensboro and High Point to supply the demand, and that it had the current for that purpose (R. 125). It appears that the amount of current consumed by the plaintiff company at Greensboro and High Point was at the time of suit less than 2% of the total available for sale by the defendant company.

In this situation, the Southern Power Company attempted, first, arbitrarily to impose upon the North Carolina Public Service Company, which it had been serving, rates in excess of those it was charging to like independent venders under similar circumstances and conditions, and, finally, to deprive it of all service whatever by unqualifiedly refusing to continue furnishing it with the necessary current.

Said Vice-President Lee (R. 112):

“Q. Your contention is that there is no governmental control or control of the courts where-by your right to contract with other public utilities reselling can be affected, and that is a matter between you and them?

A. Certainly it is.”

As stated in the opinion of the Circuit Court of Appeals, the Southern Power Company's claim was nothing less than that it (R. 336, 282 Fed. 843)

"owes no public service 'of transmission of current to independent vendors thereof'; that as to such service it is not subject to rules and regulations of the State Corporation Commission; that it may furnish one or many of these independent vendors to cities and towns to the exclusion of others; that it may refuse to furnish current on any terms to cities and towns themselves to be resold to their inhabitants; that it has absolute freedom of contract to discriminate in price and terms between all independent vendors, including cities and towns; that it has the right to create its own subordinate 'independent vendor,' Southern Public Utilities Company, and refuse to deal with any other on equal terms or on any terms."

In denying this claim, the Circuit Court of Appeals announced the governing principle of law as follows (R. 337; 282 Fed. 844):

"But when a corporation has definitely undertaken and entered upon a particular service authorized by a charter which confers the right of eminent domain, the obligation to perform the service is complete, its rates and terms are subject to regulation by public authority and it must serve all alike. In such public service it cannot pick and choose its customers."

ARGUMENT.**I.**

The Southern Power Company has dedicated its property to the business of selling electricity at wholesale to independent venders, such as the plaintiff, for resale and distribution. It is therefore subject to the legal duty of serving its customers without discrimination and at reasonable rates.

1.

The evidence overwhelmingly supports the fact of dedication.

The claim of petitioner that dedication is a question of fact and of intent may be conceded, but a clearer case could not be made than that presented by the evidence here. In the first place, the corporation is shown by its charter to have been formed for this among other lines of business. Its character as a public service corporation is made clear by the statutes of North Carolina to which it voluntarily submitted itself, and its exercise of the right of eminent domain is a conclusive index of its character. It is under no compulsion to exercise all of its charter powers, but having chosen to exercise its power to engage in the sale of electricity to independent venders, it cannot be held to say that it is a private corporation in this particular, although a public service corporation in all others.

The extent of its business in this respect is not open to dispute. The incomplete statement given in the record names no less than twenty-three towns in North Carolina and four in South Carolina in which it is selling to independent venders for resale to the ultimate consumer. In ten of these towns the sale is to a municipal corporation, which acts in the matter, of course,

not in a governmental but in a quasi-private character. *City of Los Angeles, et al. vs. Los Angeles Gas & Electric Company*, 251 U. S. 32. In ten of these towns the sale is to the Southern Public Utilities Company which, as shown by the statement of facts, is a corporation separate and apart from the Southern Power Company, although upon its formation the Southern Power Company deliberately withdrew in its favor from the retail field (R. 121). In seven of these towns the sale is either to the North Carolina Public Service Company or to some other public service corporation identical in character. One may well inquire how many more such contracts are necessary to evidence the intention of the Southern Power Company to engage in this line of business.

In addition to all this, there is the fact, which cannot be explained away or minimized, that the Southern Power Company has itself made application to the Corporation Commission of North Carolina, the regulating body, to fix and establish rates and charges by it in wholesaling electricity to the cotton mills, municipalities and other public service companies. On what possible theory can the Southern Power Company at one and the same moment invoke on the grounds of a public service the regulatory power of the Corporation Commission and deny on the claim of a private business the power of the courts concerning one and the same class of activities?

2.

The resultant duty not to discriminate is mandatory.

The duty not to discriminate is expressly imposed by the law of North Carolina. As has been stated, hydro-electric companies are declared to be public service corporations, and as such are placed under the control of the Corporation Commission. (Cons. Stats.

N. C., Sec. 1035.) The Commission is given power by Section 1054 "to make reasonable and just rules and regulations to prevent discrimination in the transportation of freight or passengers or in furnishing electricity, electric light, current, power or gas." By undertaking to operate in the State of North Carolina, the Southern Power Company, of course, subjected itself to these mandatory provisions which, after all, are merely declaratory of a duty long recognized by the common law.

In a case between the instant parties in which the precise question here arising was involved, the Supreme Court of the State of North Carolina has already held that the Southern Power Company must be taken to have devoted its property to the public use in the matter of the sale of current to independent venders as well as to those whom it chooses to classify as ultimate consumers. *North Carolina Public Service Company vs. Southern Power Company*, 180 N. C. 335, 104 S. E. 872; *Salisbury & Spencer Ry. vs. Southern Power Co.*, 179 N. C. 18, 330, 101 S. E. 593, 102 S. E. 625. In the course of these several opinions the Supreme Court of North Carolina has said (102 S. E. 625, 626):

"The defendant [Southern Power Company] had the right originally to confine its sales and contracts to those desiring electricity for direct personal consumption, and thereby retain control of the number of its customers, limiting them to that number it could adequately serve. But when defendant voluntarily entered the field of supplying current to a person or corporation which does not desire it for consumption but to sell and distribute it to others for their consumption, the case is changed. It becomes subject to the provision of law that it must extend the same treatment to all persons and corporations who stand in like case. It cannot sell to one and arbitrarily refuse to sell to another. One corporation desiring current from it for distribution purposes *prima facie* has precisely the same right to obtain it as another. A public service corpora-

tion cannot arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reasons."

And again (102 S. E. 625, 626):

"The plaintiff is a retailer of electricity and engaged in supplying the citizens of Salisbury and Spencer with electricity to light their residences and for other private purposes. It cannot compete with the defendant, for the latter does not undertake to supply residences, and is in every sense a wholesaler of the electric current. The plaintiff supplies no territory supplied by defendant, but buys its current from the latter and distributes it among the inhabitants of a limited territory. While this plaintiff has power under its charter to manufacture, at instance of defendant, it ceased to do so ten years ago, and the defendant has supplied the current by contract ever since. It has for all these years elected to treat the plaintiff and other similar corporations as a part of the general consuming public and to furnish them with electricity as a means of supplying the citizens of the territory that the defendant occupies."

And again (101 S. E. 593, 599):

"The counsel for the defendant, upon the argument, stressed the contention that, both plaintiff and defendant being public service companies, and authorized by their respective charters to generate and sell to the public electric current, plaintiff could not evade this duty and require the defendant to furnish it current and power to resell. This argument is plausible, but we think unsound and untenable upon the admitted facts in this record. The defendant's charter expressly authorizes it to sell current and power to other public utility companies for the purpose of resale. This charter power is not mandatory. Still when the defendant elected to exercise this power, and ten years ago made a contract with plaintiff, Salis-

bury & Spencer Railroad, to furnish current and power to be resold to the people of that city for the next succeeding ten years, and induced it to scrap its steam plant and to rely solely upon the defendant for its hydro-electric power and thereafter made similar contracts with the other plaintiff, the North Carolina Public Service Company, for ten years for current to be resold in Greensboro and High Point, and contracted with its own subsidiary, the Southern Public Utilities Company, to furnish it current and power up to 1944, to be resold, it dedicated its property to this particular class of public use and cannot discriminate in charge or service between the several members of this class."

It is not surprising that the conclusion of the Circuit Court of Appeals in the instant case entirely concurred with the views of the Supreme Court of North Carolina. Said the Circuit Court of Appeals (R. 337, 282 Fed. 837, 844):

"In this instance the Southern Power Company has definitely undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter, and for that purpose has exercised the power of eminent domain conferred by the state. It cannot now be heard to say that it owes no public duty with respect to that service, and that it may pick and choose its customers, and arbitrarily discriminate among them."

The principle so relied upon has the uniform support of this and of other courts.

New York & Queens Gas Co. v. McCall, 245 U. S. 345;

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650;

- Western Union Telegraph Co. v. Public Service Commission*, 230 N. Y. 95;
U. S. Telephone Co. v. Central Union Telephone Co., 171 Fed. 130 (affirmed C. C. A. 202 Fed. 66);
Perceval v. Public Service Commission (N. Y.), 163 A. D. 705, 148 N. Y. S. 583;
Attica Water, Gas & Electric Co. v. Alden-Batavia Natural Gas Co., 3 P. S. C., 2nd Dist. (N. Y.) 207;
Re East St. Louis Light & Power Co. (Ill.), P. U. R. Ann. 1919 E, 379;
Mill Creek Coal & Coke Co. v. Public Service Com., 84 W. Va. 662; 100 S. E. 557;
Re Great Western Power Co. (Cal.), P. U. R. Ann. 1917 F, 569, 580;
Clarksburg Light & Heat Co. v. Public Service Commission, 84 W. Va. 638, 100 S. E. 551;
Western Union Telegraph Co. v. Commercial Cable Co., 177 Cal. 577, 171 P. 317;
Delaware, etc., Co. v. Postal Telegraph Co., 50 Fed. 677;
Bell Telephone Co. v. Commonwealth, 17 Phila. 405, 3 A. 825;
Chesapeake & Potomac Telephone Co. v. B. & O. Telephone Co., 66 Md. 399, 7 A. 809;
Wood v. Consumers' Gas Co., 157 Ind. 345, 61 N. E. 674.

The case of *Attica Water, &c., Co. v. Alden-Batavia Natural Gas Co.*, *supra*, is interesting because of the similarity of its facts to the case at bar. The Alden-Batavia Natural Gas Company, a producing and distributing company, furnishing the village of Batavia, and having a small main running up to the corporate limits of Attica through which it furnished gas to the Attica Natural Gas Company under a ten year contract, refused to sell gas to the Attica Water, Gas & Electric

Light Company, a corporation distributing to consumers in the village of Attica. Said the Public Service Commission (p. 211):

“Every consideration of public welfare sustains the holding that a natural gas company may properly confine its sales to those desiring its commodity for direct consumption and thereby retain control of the number of its customers, limiting the same to that number which it can serve adequately. But when it voluntarily enters the field of supplying gas to a person or corporation which does not desire it for consumption but to sell and distribute to others for their consumption, the case is changed. It becomes subject to the provision of law that it must extend the same treatment to all persons and corporations who stand in like case. It cannot sell to one and arbitrarily refuse to sell to another. One corporation desiring gas from it for distribution purposes *prima facie* has precisely the same right to obtain it as another. A public service corporation cannot arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reasons.”

So in *Perceval vs. Public Service Commission*, 148 N. Y. S. 583, the Court said (p. 586):

“It is urged by the company, and apparently agreed by the Commission, that the company in any event is not obliged to furnish electricity for power and refrigerating purposes. * * * In our opinion, however, the company’s duty to furnish service does not rest upon the statute alone, but upon the common law obligation as a public service corporation which requires it to serve impartially every member of the community. It may be that, if it did not undertake to furnish electricity for power purposes to anyone, it could not be coerced to do so. Upon that question we express no opinion. It does, however, profess and undertake to furnish electric current for power purposes, and this it does by virtue of its

franchise as a public service company. So professing and undertaking, it cannot arbitrarily pick and choose whom it will serve and whom it will not."

3.

The fact of dedication cannot be disguised nor the duty of equal service evaded by the device of special contracts.

The petitioner points to the fact that its sales to independent public service utilities, to municipal corporations and to the Southern Public Utilities Company have all been based upon express contracts, and that even when these contracts were based on standard printed forms they differed in the details which went to fill up the blanks left for that purpose. Prior to the reluctant hour when petitioner became convinced that a uniform rate was demanded by the law, it undertook to base these contracts upon varying rates. All this is now asserted to be evidence of an intent not to dedicate its property to public use. The contention, in other words, comes to this, that so long as the Southern Power Company covers each transaction by a special contract it may engage in this class of business upon any scale that it wishes without bringing itself within reach of the law.

Reduced to its simplest terms, the claim is that the petitioner, by the mere process of making discriminatory contracts, can free itself from the obligation which the law imposes not to discriminate. Although engaging in a course of conduct which admits of but one construction as to its intent, it may evade the consequences by a formal declaration that it does not intend to be bound by the consequences of its own acts.

The intent of the parties, of course, is to be gathered from their entire course of conduct.

Van Dyke v. Geary, 244 U. S. 39;
Terminal Taxicab Co. v. Kutz, 241 U. S. 252;
Lloyd v. Haugh Transfer Co., 223 Pa. 148, 72
 Atl. 516, 517;
Bare v. Am. Forwarding Co., 242 Ill. 298, 89
 N. E. 1021;
People ex rel. Perceval v. Pub. Ser. Com., 148
 N. Y. S. 583;
State v. Butte City Water Co., 18 Mont. 199,
 44 P. 996;
 1 Wyman P. S. C. Sec. 206.

Or, as Wyman on Public Service Corporations states the law, Sec. 206:

“When duties, not rights, are involved, such declarations that the business is private will not prevail if the other evidence is to the contrary.”

No matter what contracts petitioner may have chosen to make, they cannot rise superior to the public right. As this court said in *Munn v. Illinois*, 94 U. S. 113, 126:

“Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control.”

Of a similar contention which was urged in *Clarksburg Light & Heat Co. v. Public Service Commission*, *supra*, the Court said (100 S. E. 551, 555):

“The duty of the petitioner to supply the public with gas is its paramount duty. It makes

no difference who that public is, or to what use the gas is to be appropriated. If the petitioner was allowed to conduct one-half of its business under public regulation, and to sell the other half of its product upon private contract, the result would be disastrous to the public, for the rates charged to private consumers would control those charged to the public consumers, or vice versa.

* * * * *

No one can serve two masters is as true to-day as it was 2,000 years ago, and it cannot be doubted that, if this petitioner is allowed to divide its allegiance in the manner desired, the service rendered by it to the class of its patrons, which it would soon despise, would be inefficient and ineffective to meet their reasonable demands, to the end that the needs of that other class of patrons which had secured its favor might be the more efficiently met. We are clearly of the opinion that, so long as the petitioner is engaged in supplying gas to the public in the manner in which it is at this time, it cannot supply a part of that public under private contract, and a part of it under public regulation."

Indeed, it is elementary that a public service corporation cannot by making contracts for future service or by mortgaging its property or pledging its income evade its public duties or prevent or postpone the exercise by the State of the power to compel their performance.

Chicago, Burlington & Quincy R. R. Co. v. Iowa, 94 U. S. 155, 162;

Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 482;

Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372;

Producers' Transportation Company v. Railroad Commission of the State of California, 251 U. S. 228.

In support of its claim to this right of special contract, petitioner relies upon *The Express Company Cases*, 117 U. S. 1; the *Wharf Case*, *Louisville & Nashville R. R. Co. v. West Coast Naval Stores Co.*, 198 U. S. 483; and the *Taxicab Case*, *Donovan v. Pennsylvania Co.*, 199 U. S. 279. In language to which nothing need be added, the Circuit Court of Appeals has disposed of its contention as follows (R. 337; 282 Fed. 844-5):

"The Supreme Court cases relied on by the defendant are not controlling. In *The Express Company Cases*, 117 U. S. 1, the basis of the decision is that the railway companies never held themselves out as public service corporations in the sense of furnishing accommodation to other carriers who might wish to do an independent business on their lines. The court pointed out that such general service to all express companies applying for it is rendered impossible by the nature of the business. In *Louisville & Nashville R. R. Co. v. West Coast Naval Stores Co.*, 198 U. S. 483, the court held that the public was not entitled to use as a public terminal for the delivery of freight a wharf built by the railway company over the water; putting the decision expressly on the ground that the wharf was built exclusively for the use of the railroad and had never been dedicated to a public use as a public terminal. The distinction is pointed out by this court in *Baker-Whiteley Coal Co. v. B. & O. R. Co.*, 188 Fed. 410. *Donovan v. Pennsylvania Co.*, 199 U. S. 279, decided that a railroad company has a right to contract with one transfer company to furnish cabs for the use of passengers and exclude other cabmen from its premises. But the decision was on the ground that the business of the railroad was to carry and provide for the convenience of passengers, that it had undertaken and owed no public duty to cabmen and therefore had the right to exclude them from its station, so long as such exclusion did not interfere with the reasonable accommodation of passengers."

II.

The claim that the North Carolina Public Service Company is a competitor of the Southern Power Company and as such not entitled to service is untrue in fact and without foundation in law.

1.

There is no existing competition between the two companies.

The claim that the North Carolina Public Service Company is a competitor of the Southern Power Company is wholly unsupported by the facts. Whether such competition does or does not exist is to be determined, not by comparing clause by clause the charters of the two corporations, but by looking to the business in which they are actually engaged. The Southern Power Company is a wholesaler of electric current, having control of all the hydro-electric current produced in this particular region. The North Carolina Public Service Company, on the other hand, is merely a local distributor of electric current, retailing it only in the cities of Greensboro and High Point and their vicinity. Within these cities the Southern Power Company does not, and for lack of franchise cannot, make sale of any current to the local consumers. Such sales as the North Carolina Public Service Company makes in the vicinity of these cities but outside the city limits it makes in express accord with the contracts between its predecessor corporations and the Southern Power Company, and with the consent of the Southern Power Company. There is no single purchaser named in the record for whose patronage the two companies are contending.

Competition, of course, is a matter of fact and not of hypothesis. As defined by this Court in *U. S. v. Union Pacific R. R.*, 226 U. S. 61, 87:

“To compete is to strive for something which another is actively seeking and wishes to gain.”

The North Carolina Public Service Company is no more a competitor of the Southern Power Company than are the Leakesville Light & Power Company, the Piedmont Railway & Electric Company, the Hillsboro Electric Light Company, the Norwood Light & Power Company and the Lancaster Light & Power Company, all independent corporations and distributors whom the Southern Power Company is serving, and all corporations of the same general character as the North Carolina Public Service Company.

Indeed, it is no more a competitor than are the various municipal corporations to whom power is being supplied at wholesale. Each of these municipalities is empowered by its charter to build and operate its own electric light system, using for that purpose, of course, either steam or water power at its pleasure, and any one of them might, if it saw fit, engage tomorrow in producing and supplying electric current to its inhabitants in competition with any supply which the Southern Power Company might choose to furnish.

Admittedly, the Southern Public Utilities Company is not a competitor of the Southern Power Company, not only because of the stockholders common to the two companies, but because the Southern Public Utilities Company is engaged in the retail business which the Southern Power Company expressly abandoned to it. Yet questions of stock ownership aside, no distinction can be drawn between the relations that prevail in point of competition between the Southern Power Company and the Southern Public Utilities Company on the one hand, or the North Carolina Public Service Company on the other.

Even if there were some existing competition between the two companies (which respondents deny) that alone would not justify discrimination in rates and service.

So long as the Southern Power Company has engaged, as it has, in the business of selling electric current at wholesale for distribution at retail, it cannot pick and choose among its customers. It cannot deny service to the North Carolina Public Service Company on the theory that it is a competitor where it is continuing its service to others similarly situated. This doctrine has been the subject of repeated adjudication.

Western Union Telegraph Company v. Public Service Commission, 230 N. Y. 95;

Postal Telegraph Cable Company v. Associated Press, 228 N. Y. 370;

U. S. Telephone Company v. Central Union Telephone Company, 171 Fed. 130; affirmed C. C. A. 202 Fed. 66;

State v. Cadwallader, 172 Ind. 619, 87 N. E. 644;

Central Elevator Company v. Moloney, 174 Ill. 203, 51 N. E. 254;

Postal Telegraph Cable Company v. Cumberland T. & T. Co., 177 Fed. 726.

In *Western Union Telegraph Company v. Public Service Commission*, *supra*, it was insisted that the Western Union Telegraph Company was under no duty to permit its rival, the Postal Telegraph Company, to use its wires on credit in forwarding the messages of the Postal Telegraph Company in the same way as did other customers of the Western Union. This conten-

tion the New York Court of Appeals disposed of in a unanimous opinion, as follows (230 N. Y. 95, 100):

"The answer made by the respondent is that the Postal Company is not its customer, but its competitor, and thus stands in a different position, and further that by accepting their telegrams they are helping the Postal to deceive the public. This is aside from the real issue. The main consideration is where lies the benefit to the public and not that of assisting either of these corporations in their rivalries. * * * The public is not much concerned with the rivalries of these two companies. The question narrows down to this: Is one less a customer of the Western Union Company because it is a competitor and is not a competitor presenting himself as a customer a part of the general public and entitled to the same privileges and rights as any other customer because incidentally he happens to be a competitor? I can see no difference in principle. * * * Between these two corporations each represents the public when applying to the other for service, and no discrimination can be made by either against the other, but each must render to the other the same services it renders to the rest of the community under the same conditions."

Said the Court in *Postal Telegraph Cable Company v. Associated Press*, *supra*, in discussing the same question (228 N. Y. 370, 383):

"A public service corporation is not at liberty to grant extraordinary facilities to one man, and arbitrarily refuse them to another. It need not depart from the beaten track at all. If it does, it must not govern the deviation by prejudice or favor. What it grants to one, it must, in like conditions, when detriment would follow preference, grant impartially to all, within the limits of capacity."

In *U. S. Telephone Co. v. Central Union Telephone Co.*, *supra*, Judge Taylor, in discussing the relation of the two telephone companies to each other, said (171 Fed. 130, 144):

“But we have a very different situation where, as in this case, a local company, assuming that it cannot be compelled to make or permit a connection with a long distance company, does in fact permit it. If the local company extends the use of its lines to long distance service, does it make the long distance service any the less of a public character than its local service? Assuming that it had a right to remain independent of and isolated from long distance business, does it not give up that right of local independence and isolation when it takes on long distance business? And if, in respect to long distance business, it has granted the right of connection to one long distance company, can it, either under the common law or the statutes of Ohio deny to one long distance company the right and privilege which it has granted to another? It seems to me that to put this question is to answer it. To this effect is *Ohio ex rel. v. Telephone Company*, 36 Ohio State 296, 38 Am. Rep. 583.”

Judge Taylor then quotes with approval the following from the syllabus of *State v. Cadwallader*, *supra*:

“Where an operator of a telephone system furnished connected immediate service to separate exchanges and their patrons, but denied such service to another exchange and its patrons of the same class, the operator discriminated against the latter in violation of the common law and of the statute of Indiana, requiring telephone companies to supply applicants impartially.”

In commenting upon this case, Judge Taylor continues (171 Fed. 130, 146):

“I find myself profoundly impressed with the soundness of the conclusion just quoted, and, in-

deed, I can conceive of no plausible argument against it. The telephone company is a public servant and is a common carrier of news, as the Indiana Supreme Court puts it. It cannot enter into a contract which tends to create a monopoly; and it cannot deny to one person the rights and privileges which it grants to other persons similarly situated."

This same question is fully discussed in the well-considered case of *Postal Cable Telegraph Company v. Cumberland T. & T. Company*, *supra*. The Court there said (177 Fed. 726, 732):

"The portion of the sovereign power with which telephone companies are as common carriers endowed is likewise given them for the purpose of serving not merely part of the public, but all of the public; and all persons composing the public, even though they be, in a sense, competitors, are entitled to use their privileges upon equal terms, and 'have equal rights both in respect to service and charge.'"

The repeated claim of the Southern Power Company that it may prefer among its customers at least its ally, the Southern Public Utilities Company, may be answered in the language of Mr. Wyman in his book on Public Service Corporations, Section 710:

"This at least may be regarded as conceded—that a public service company, if engaged in private business for itself, dependent upon the service it conducts, ought not to prefer itself to its competitors in business among the general public who have already made application for service. * * * While those who conduct private enterprises may use many schemes, those who confess a public employment must not adopt any business policies which are in any way truly inconsistent with their public duties. And it may very probably turn out that it will be found necessary, for the maintenance of the highest type of public service, to forbid those who undertake

such callings from engaging at all in business of their own where their interests might come in conflict with the interests of those whom they are serving."

3.

There is no inconvenience, present or prospective, in the continued service of current to the North Carolina Public Service Company.

No little effort has been expended to defend the action of the petitioner on the ground of inconvenience. In order to emphasize this contention, petitioner has made and filed in this Court its so-called motion to maintain the *status quo* of the parties in which it has been at some pains to show that the power consumed by the North Carolina Public Service Company has materially increased during the years 1920, 1921 and 1922.

Of this and all similar contentions it may be said first of all, that at the time the business was begun at High Point and Greensboro, all parties contemplated that it would be a growing one. Thus the High Point Electric Power Company wrote to the Southern Power Company in advance of making the contract (R. 159):

"The business is growing and in the next twelve months we will add many more customers. We hope to get the City Water Works four miles from town. * * * We will go after everything here and land everything possible on our line."

In June, 1909, the Southern Power Company wrote to the Manager of the Greensboro Electric Company (R. 290):

"Your Greensboro situation is going to grow very fast."

In January, 1914, the Manager of the Southern Power Company acknowledged the receipt of a list of prospective electric power customers in and about Greensboro (R. 291), and in 1917 the Southern Power Company writes (R. 292),

“We would like to take care of the future as well as the present.”

thus verifying the statement of the witness Lee (R. 124) that the contract with the North Carolina Public Service Company “contemplated that this business should grow in ten years.”

But if the business of the North Carolina Public Service Company has grown, the Southern Power Company has been no less fortunate. The answer filed in response to the aforesaid motion discloses the fact that since the original decree was entered in this case, the generating horse-power of the Southern Power Company has been increased from 300,000 to 500,000, and its electric capacity measured in kilowatt hours from the 741,984,705 K. W. H. shown by the record (R. 93) to 2,808,000,000 K. W. H.

At the time of the decree it appeared, as we have stated above, that the service at Greensboro and High Point called for something less than 2% of the total power available on the part of the Southern Power Company, whereas at present, the date of the motion and of its submission, the demand is for less than 1% of the petitioner's total capacity output (Reply to Motion, p. 13). Not only so, but it appears that notwithstanding its pretended alarm at the growth of the business in Greensboro and High Point, petitioner during this period has been engaged in taking on new customers, more specifically the Caldwell Power Company, which operates at the towns of Lenoir and Morgantown. (See Exhibit A with Respondents' reply to the motion.)

It also appears, by way of additional reassurance, that in the month of July, 1921, the Southern Power Company was granted by the North Carolina Corporation Commission an extra charge of 10% for its current sold to other public utility companies (Reply, p. 10); and that no later than the 13th day of October, 1923, it filed its petition before the Commission asking a further increase.

The fact is, and it is a matter of general knowledge, that the entire region covered by petitioner's lines in North Carolina and South Carolina is enjoying a period of great prosperity and development. That the petitioner expects this development to continue is manifest from the exertions which it has made since the decree in this case to extend and enlarge its facilities for service. It ill becomes the petitioner, however, to make of this growth and development an excuse for cutting off existing customers in order to secure new ones, or for discriminating among its patrons in order by eliminating them entirely from the field to draw a greater share of profit to its own stockholders. It will be time enough when petitioner's capacity is truly overtaxed to consider, in the proper forum, the equities prevailing among its patrons.

There is no escape, we submit, from the conclusion that the petitioner's refusal to continue furnishing electric energy to the respondents at Greensboro and High Point is not justified by the facts of record and is unwarranted in law. Its course of dealing discloses that its refusal does not spring from economic reasons, since the respondent Public Service Company is ready and willing to pay the same rate charged other like consumers. Its action can be ascribed only to a desire to acquire for itself a complete monopoly of the wholesale distribution and sale of hydro-electric current in this part of North and South Carolina, and by a system of discriminatory treatment to obtain a similar monopoly in the retail field for the Southern Public Utilities Company in which its stockholders are interested.

CONCLUSION.

Said the Supreme Court of North Carolina in *Salisbury & Spencer Railway Company and North Carolina Public Service Company v. Southern Power Company*, 179 N. C. 18, 101 S. E. 593, 599:

"It is of the highest importance that these claims of the defendant Southern Power Company to discriminate in the rates charged by it to purchasers under like conditions should be clearly denied by the courts."

The proceeding in mandamus which the respondents have adopted furnishes the remedy provided by the Statutes of North Carolina and sanctioned as appropriate by the decisions of its highest court.

It is respectfully submitted that on the law and the facts the decree of the Circuit Court of Appeals should be affirmed.

AUBREY L. BROOKS,

JOHN W. DAVIS,

KING, SAPP & KING,

Attorneys for Respondent

North Carolina Public Service Company.

C. A. HINES,

Attorney for Respondent

City of Greensboro.

DRED PEACOCK,

Attorney for Respondent

City of High Point.

SOUTHERN POWER COMPANY v. NORTH CAROLINA PUBLIC SERVICE COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 110. Argued November 28, 1923.—Decided January 7, 1924.

A writ of certiorari, granted under the impression, induced by the petition, that a question of public importance is involved, will be dismissed when the argument reveals that the impression was erroneous.

Writ of certiorari to review 282 Fed. 837, dismissed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed in part a decree of the District Court, in a case removed from a court of North Carolina. The proceeding was brought by the Public Service Company and two cities, under North Carolina statutes, to compel the present petitioner to continue furnishing electric power to the Public Service Company for use in operating street cars in the cities, and for the use of the cities and their citizens for light and power. The decree of the District Court, as modified by the court below, granted this relief.

Mr. R. V. Lindabury and *Mr. William P. Bynum*, with whom *Mr. W. S. O'B. Robinson, Jr.*, *Mr. E. T. Causler* and *Mr. R. C. Strudwick* were on the brief, for petitioner.

Mr. John W. Davis and *Mr. Aubrey L. Brooks*, with whom *Mr. C. A. Hines* and *Mr. Dred Peacock* were on the brief, for respondents.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

This writ must be dismissed. The petition therefor stated that the cause involved a grave question of vital importance to the public, and alleged as special reason for its reëxamination that the decree would deprive petitioner of property without due process of law and of freedom to contract, contrary to the Federal Constitution. The opinion below is reported in 282 Fed. 837.

The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto.

Heretofore we have pointed out the necessity for clear, definite and complete disclosures concerning the controversy when applying for certiorari. *Furness, Withy & Co. v. Yang-Tsze Insurance Association*, 242 U. S. 430; *Layne & Bowler Corporation v. Western Well Works*, 261 U. S. 387. The opinion first cited states that during the 1915 term one hundred fifty-four petitions were presented and suggests the probability of a largely increased number. During the last term (1922) petitions were filed in four hundred and twenty causes.

Obviously it is impossible for us critically to examine so many records before ruling upon applications and we must rely very largely upon preliminary papers. Unless the requirements specified in *Furness, Withy & Co. v. Yang-Tsze Insurance Association* are observed we cannot hope properly to dispose of an increasing docket.

Dismissed.